

OFFICE COPY

APPENDIX

Supreme Court, U.S.

FILED

FEB 11 1971

E. ROBERT SEAYER, CLERK

In the Supreme Court of the United States

October Term, 1971

No. 71-5103

JOHN J. MORRISSEY AND G. DONALD BOOHER, PETITIONERS,

v.

LOU V. BREWER, WARDEN, ET. AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 19, 1971
CERTIORARI GRANTED DECEMBER 20, 1971

INDEX

| | Page |
|--|------------------------|
| Record from the United States District Court, Southern District of Iowa in <i>Morrissey v. Brewer</i> , Warden, Civil No. 3-869-D | 1 |
| Relevant Docket Entries | 1, 2 |
| Petition for writ of habeas corpus | 3 |
| Notice of transfer of this cause from a pretermitted division | 8 |
| Order to show cause | 9 |
| Return | 10 |
| Memorandum in support of return | 12 |
| Traverse | 15 |
| Memorandum in supplement of traverse | 17 |
| Supplement to return | 21 |
| Supplement to traverse | 22 |
| Order | 26 |
| Amendment to petition | 26 |
| Amended return, including the Order of the Iowa Board of Parole | 27, 30 |
| Supplement to return, including the Order denying writ of habeas corpus, dated in the Supreme Court of Iowa on July 25, 1969, and the Order in the Supreme Court of Iowa dated September 15, 1969 | 36, 37 |
| Supplement to traverse, including the Inmate memo and Mittimus | 38, 41, 42 |
| Supplement to return | 44 |
| Supplement to traverse | 46 |
| Order | 49 |
| Petition for amendment to original petition | 51 |
| Requested documents concerning petitioner's parole revocation and state habeas corpus proceedings, including Petition for writ of habeas corpus, the Order of the District Court of the State of Iowa in and for Lee County dated June 26, 1969; the Order of the District Court of the State of Iowa in and for Lee County dated August 4, 1969; the Notice of Appeal to Supreme Court; Order of the Supreme Court of the State of Iowa on September 15, 1969; the Order of the Supreme Court of the State of Iowa on July 25, 1969 | 53, 54, 57, 59, 62, 63 |
| Requested documents concerning petitioner's parole revocation, including Report of Violation | 64, 65 |

| | Page |
|---|------|
| Order | 70 |
| Notice of Appeal to United States Court of Appeals for the Eighth Circuit | 72 |
| Order | 74 |
| Order granting certificate of probable cause | 75 |
| Record from the United States District Court, Southern District of Iowa in <i>G. Donald Booher, v. Lee and O'Brien Counties and the State of Iowa</i> , Civil No. 3-897-D | 76 |
| Relevant Docket Entries | 76 |
| Petition for writ of habeas corpus | 78 |
| Notice of transfer of this cause from a pretermitted division | 86 |
| Order to show cause | 87 |
| Return | 88 |
| Memorandum in support of return | 90 |
| Answer | 93 |
| Order, April 30, 1970 | 95 |
| The Respondent filed on May 7, 1970 the following exhibits: | |
| The Order of the District Court of the State of Iowa in and for Lee County dated November 26, 1969 | 96 |
| The Order of the District Court of the State of Iowa in and for Lee County dated January 6, 1970 | 97 |
| The Order of the District Court of the State of Iowa in and for Lee County dated February 26, 1970 | 98 |
| Memorandum and Order, May 27, 1970 | 99 |
| The Respondent filed on June 2, 1970 the following exhibits: | |
| Parole Agreement | 100 |
| Form CP-37263 | 102 |
| Memo of September 3, 1969 | 103 |
| Interoffice Memorandum dated September 16, 1969 | 104 |
| Report of Violation | 105 |
| Hold Order | 109 |
| Order of Iowa Board of Parole | 110 |
| Official Notice from Iowa Department of Public Safety | 111 |
| Order | 113 |
| Certificate of Probable Cause | 115 |
| Order | 116 |
| Order granting certificate of probable cause | 118 |
| Proceedings in the United States Court of Appeals for the Eighth Circuit in Nos. 20328 and 20425 | 119 |
| Opinion, Matthew, J., April 21, 1971 | |
| Judgment in No. 20328 | 155 |

| | Page |
|---|------|
| Judgment in No. 20425 | 156 |
| Petition for rehearing and for issuance of the writ of habeas corpus upon mandate of the court issued in this case en banc on April 21, 1971, No. 20425 | 157 |
| Order denying petition for rehearing, Case No. 20425 | 161 |
| Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari | 162 |

No. 3-869-D Civil

JOHN J. MORRISSEY, #29739

Petitioner,

vs.

LOU V. BREWER, Warden,

Respondent.

DAVENPORT DIVISION
Memorandum Of Papers
Filed, and Date of Filing

DATE

1. Sept. 12, 1969 Petition for Writ of Habeas Corpus.
2. Sept. 12, 1969 Notice of Transfer from A Pretermitted Division.
3. Sept. 19, 1969 Order to Show Cause.
4. Sept. 23, 1969 Motion for an Enlargement of Time.
5. Sept. 23, 1969 Affidavit of Service.
6. Sept. 23, 1969 Order granting to 10-13-69 to make Return.
7. Oct. 13, 1969 Return.
8. Oct. 13, 1969 Memorandum in Support of Return.
9. Oct. 13, 1969 Affidavit of Service.
10. Oct. 20, 1969 Traverse.
11. Oct. 20, 1969 Memorandum in Supplement of Traverse.
12. Oct. 24, 1969 Supplement to Return.
13. Oct. 24, 1969 Affidavit of Service.
14. Oct. 31, 1969 Supplement to Traverse.
15. Nov. 28, 1969 Order directing filing of letters as amendments to Petition.
16. Nov. 28, 1969 Amendment to Petition.
17. Nov. 28, 1969 Amendment to Petition.
18. Dec. 18, 1969 Amended Return.
19. Dec. 23, 1969 Order that Respondent to file supplemental response and that Petitioner shall have an additional ten days to file a supplemental traverse thereto.
20. Jan. 5, 1970 Supplement to Return
21. Jan. 9, 1970 Supplement to Traverse.
22. Jan. 23, 1970 Supplement to Return.
23. Jan. 23, 1970 Affidavit of Service.

DATE

24. Feb. 2, 1970 Order granting 20 days to Petitioner to file reply to Supplement to Return filed by Respondent.
25. Feb. 5, 1970 Supplement to Traverse.
26. Mar. 25, 1970 Order to file copies in state possession.
27. April 1, 1970 Order granting leave to file amendment & ordering Respondent to file response to matter raised by the Amendment.
28. April 1, 1970 Amendment to Original Petition.
29. April 10, 1970 Request Documents "Concerning Petitioner's Parole Revocation and State Habeas Corpus Proceedings.
30. April 9, 1970 Requested Documents Concerning Petitioner's Parole Revocation.
31. April 13, 1970 Order Denying petition for Writ of Habeas Corpus.
32. April 21, 1970 Notice of Appeal to Eighth Circuit Court of Appeals. (Treated as Application for a Certificate of Probable Cause).
33. April 21, 1970 Order Denying application for a Certificate of Probable Cause.
34. June 4, 1970 Copy of Order from CCA granting Application for Certificate of probable cause and directing Clerk to Docket Appeal.
35. April 22, 1971 Judgment Mandate (attested copy from CCA).
Affirming District Court's Judgment.
36. April 22, 1971 Opinion from CCA (attested copy).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

JOHN J. MORRISSEY #29739
Full name and prison number
(if any) of Petitioner

Case No. 2-468-E
(To be supplied by the
Clerk of the District
Court)

VS.

LOU V. BREWER (Warden)
Name of Respondent

[Filed, Sep 12 1969, Clerk, U.S. District Court Southern
District of Iowa]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PERSONS IN STATE CUSTODY

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to ascertain that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and two copies* shall be mailed to the Clerk of the District Court for the Southern District of Iowa, at Des Moines, Iowa.

If petitioner desires to have a filed copy return to him, he shall request an additional set of forms and submit same with the original and required two copies.

1. Place of detention: Iowa State Prison, Ft. Madison, Ia.

2. Name and location of court which imposed sentence
None.

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) Parole Violation (Sect. 247.28) 1966 Ia. Code.

(b)

(c)

4. The date upon which sentence was imposed and the terms of the sentence:

(a) on or about 2-15-69

(b)

(c)

5. Check whether a finding of guilty was made:

There was no plea entered

(a) after a plea of guilty.

(b) after a plea of not guilty.

(c) after a plea of nolo contendere.

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury

(b) a judge without a jury.

7. Did you appeal from the judgment of conviction or the imposition of sentence? yes

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

i. Lee County District Court, Ft. Madison, Ia.

ii. Iowa State Supreme Court, Des Moines, Iowa

iii.

(b) the result in each such court to which you appealed:

i. Denied

ii. Denied

iii.

(c) the date of each such result:

i. 6-26-69

ii. 7-25-69

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 388 F2d 91—267 F Supp. 433.

ii. 663.4-663.5 Iowa Code.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

10. Prior to this Petition have you filed with respect to this conviction

(a) any petitions in State or Federal Courts for habeas corpus? yes

(b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)?

(c) any other petitions, motions or applications in this or any other court?

11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application

(a) the specific nature thereof:

i. I was arrested for a felony and denied due process.

ii.

iii.

iv.

(b) the name and location of the court in which each was filed:

i. Lee County District Court, Ft. Madison, Ia.

ii.

iii.

iv.

(c) the disposition thereof:

i. Denied

- ii.
 - iii.
 - iv.
- (d) the date of each such disposition:
 - i. 6-26-69
 - ii.
 - iii.
 - iv.
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. 388 F2d 91—267 F Supp. 433.
 - ii.
 - iii.
 - iv.
- 12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) I was arrested for a felony Sect. 247.28 Ia. Code and was denied due process.
 - (b) Was not brought before a Judge for a hearing
 - (c) No indictment found timely, charge not dismissed
- 13. State concisely and in the same order the facts which support each of the grounds set out in (12):
 - (a) 14th Amend. and 88 S. Ct. 1114
 - (b) Sect. 757.2, 1966 Ia. Code
 - (c) Sect. 795.1, 1966 Ia. Code.
- 14. Has any ground set forth in (12) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? yes
- 15. If you answered "yes" to (14), identify
 - (a) which grounds have been previously presented:
 - i. A, B, C, question #12
 - ii.
 - iii.
 - (b) the proceedings in which each ground was raised:
 - i. Habeas Corpus
 - ii.
 - iii.
- 16. If any ground set forth in (12) has not previously been presented to any court, state or federal, set forth

the ground and state concisely the reasons why such ground has not previously been presented:

- (a)
- (b)
- (c)

17. Were you represented by an attorney at any time during the course of

- (a) your arraignment and plea? No
- (b) your trial, if any? No
- (c) your sentencing? No
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Austin J. Roshid 619-7th Ave. Ft. Madison, Iowa.

ii.

iii.

(b) the proceedings at which each such attorney represented you.

i. Notice of appeal to Iowa Supreme Court

ii.

iii.

I understand that a false statement or answer to any of the questions contained in this pleading will subject me to penalties for perjury.

JOHN J. MORRISSEY
Signature of Petitioner

Subscribed and Sworn to before
me this 11th day of
September, 1969.
(month) (year)

Wm. F. Abel
Notary Public
My commission expires
July 4, 1972
(Month, Day, Year)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

JOHN J. MORRISSEY, #29739,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 2-468-E
Notice of Transfer of
This Cause from a Pre-
termitted Division

[Filed, Sep 12 1969, R. E. Longstaff *Clerk*, U.S. District
Court Southern District of Iowa]

* * * *

Pursuant to the provisions of subsisting Order of Pre-
termmission and Rule No. 2, Local Rules of the United States
District Court, Southern District of Iowa, this cause is
transferred from the Eastern Division to the Davenport
Division of this District, and is now docketed and identified
under Civil Number 3-869-D.

Henceforth, all documents presented to the Court and
all record entries made by the Court in this cause shall bear
in the caption the Civil Number last above written.

Dated this 12th day of September, 1969.

R.-E. LONGSTAFF
R. E. Longstaff, *Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY, #29739

vs.

LOU V. BREWER, Warden

Civil No. 3-869-D
Order To Show Cause

[Filed Sep 19 1969, Clerk, U.S. District Court Southern
District of Iowa]

This matter is before the court upon the Petition for Writ of Habeas Corpus, filed on September 12, 1969, and the court having examined said Petition and being duly advised in the premises, it appears that the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, has custody of the Petitioner.

IT IS THEREFORE ORDERED

1. Lou V. Brewer, Warden, respondent, is ordered and directed to show cause why a Writ of Habeas Corpus should not be granted, and said respondent shall make return certifying the true cause of the detention of Petitioner within three days after service of this Order upon him.

2. The Clerk of the United States District Court, Southern District of Iowa, shall forthwith serve this Order upon the respondent by certified mail.

Dated: September 19, 1969.

Roy L. Stephenson
ROY L. STEPHENSON
Chief Judge

9-19-69 Copy mailed to Petitioner &
mailed by certified mail to Atty for Respondent.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER,
Warden,
Respondent.

Civil No. 3-869-D
Return

[Filed, Oct 13 1969, R. E. Longstaff, *Clerk*, U.S. District
Court Southern District of Iowa]

COMES NOW, the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and makes Return to the Order to Show Cause issued herein as follows:

1. That the petitioner, John J. Morrissey, is presently detained under authority of a mittimus issued from the District Court of Iowa, Linn County, pursuant to the revocation of his parole, pursuant to Section 247.28 of the 1966 Code of Iowa. Petitioner, on January 5, 1967 plead guilty to the charge of False Drawing or Uttering of Checks in violation of Section 713.3, 1962 Code of Iowa; was paroled on June 20, 1968 and sent back to the Iowa State Penitentiary, Fort Madison, Iowa on or about January 31, 1969 for parole violation.

2. That the petition for writ of habeas corpus filed herein is insufficient and a writ of habeas corpus should not be issued for the reasons set forth in the attached memorandum in support of this return.

RICHARD C. TURNER,
Attorney General of Iowa

By Michael J. Laughlin

MICHAEL J. LAUGHLIN

Assistant Attorney General

State House, Des Moines, Iowa

Attorneys for Respondent.

CERTIFICATION

It is hereby certified by the undersigned that the cause of detention of the petitioner set forth in Paragraph 1 of the appended return is true and correct.

RICHARD C. TURNER
Attorney General of Iowa

By **Michael J. Laughlin**

MICHAEL J. LAUGHLIN
Assistant Attorney General
State House, Des Moines, Iowa
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,

Petitioner,

vs.

LOU V. BREWER, Warden,

Respondent.

Civil No. 3-869-D

Memorandum in Support
of Return

[Filed, Oct 13 1969, R. E. Longstaff Clerk, U.S. District
Court Southern District of Iowa]

STATEMENT OF THE CASE

On January 5, 1967, the petitioner entered a plea of guilty in the District Court of Iowa, Linn County, to charge of False Drawing or Uttering of Checks in violation of Section 713.3 of the 1962 Code of Iowa. He was sentenced to a term of seven years at the Iowa State Penitentiary, Fort Madison, Iowa. On June 20, 1968 petitioner was granted a parole from the Iowa State Penitentiary. On January 31, 1969 the petitioner was arrested for parole violation and was returned to the Iowa State Penitentiary, Fort Madison, Iowa. Petitioner applied for a writ of Habeas Corpus in the District Court of the State of Iowa, Linn County, Iowa, which application was denied on the 26th day of June, 1969. Petitioner then sought appeal to the Supreme Court of the State of Iowa and said appeal was dismissed on September 15, 1969.

ARGUMENT

Petitioner asserts that he was deprived of his constitutional rights when he was arrested for parole violation and sent back to prison upon having his parole revoked. More specifically petitioner contends that a hearing should have been held to determine whether his parole status was legally revoked according to law. Petitioner contends that the revocation of his parole without notice and hearing constitutes a denial of due process and that Section 246.26 of the 1966

Code of Iowa which provides for such revocation of probation on parole without notice and hearing is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

There is no merit in petitioner's contention that he was denied due process in the revocation of his parole. One returned to imprisonment as a parole violator is not entitled to a hearing or a judicial review of the actions of the State Parole Board in revoking the petitioner's parole.

In the leading case of *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1, the Iowa Supreme Court stated the applicable law in this type of situation (256 Iowa at 1167):

"Iowa is among the majority of states which have consistently held that under statutes relating to revocation of probation or suspension of sentence which contain no express provision for notice and hearing, such a revocation without notice and hearing does not constitute a denial of due process."

In *State v. Rath*, 258 Iowa 568, 139 N.W.2d 468, the Iowa Supreme Court again examined and reaffirmed its previous decisions to the effect that a parolee has no rights in connection with the revocation of his parole or probation.

The Federal Courts have also been in agreement with the Iowa rule and have held that a parolee has no constitutional right to notice and a hearing on the question of revoking his probation or parole. See *Rose v. Haskins*, 388 F.2d 91; *Curtis v. Bennett*, 351 F.2d 931; *Hutchinson v. Patterson*, 267 F.Supp. 433; *United States v. Hartsell*, 277 F.Supp 933.

The petitioner cites the case of *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, as authority for the proposition that he should have been granted a hearing upon revocation of his probation. However *Mempa* is clearly distinguishable from the case at bar:

In the instant case, sentencing had been completed, the criminal proceeding had ended and plaintiff had been accorded conditional liberty by legislative grace. In *Knight v. State*, Md., 255 A.2d 441, the appellant, on appeal from the revocation of his probation and suspended sentence on two convictions, claimed, as does plaintiff here, that he was denied right to counsel at the time of his revocation hearing

as required by *Mempa*. In rejecting the contention, the Maryland Court of Special Appeals stated (255 A.2d at 447 and 448):

"We think it clear that rationale of *Mempa* is that, as the *imposition* of sentence is a critical stage of a criminal proceeding, a defendant has the right to counsel at any proceeding at which sentence is *imposed*, no matter how the proceeding is characterized. We limit *Mempa* to this context. We do not find its holding to be that every hearing for a judicial determination as to whether the conditions of probation have been violated invokes the right to counsel. . . ." Emphasis added.

Thus, it is well established that a parolee in Iowa has no constitutional right to notice and a hearing on the issue of revoking his parole.

CONCLUSION

For all the above reasons, respondent respectfully submits that the petition for writ of habeas corpus should be denied.

Respectfully submitted,
 RICHARD C. TURNER,
Attorney General of Iowa.
 By Michael J. Laughlin
 MICHAEL J. LAUGHLIN
Assistant Attorney General
 State House, Des Moines, Iowa
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY #29739
Petitioner,

vs.

Civil No. 3-869-D
Transverse

LOU V. BREWER, Warden I.S.P.
Respondent.

[Filed, Oct 20 1969, Clerk, U.S. District Court Southern
District of Iowa]

Comes now the petitioner John J. Morrissey #29739, of the Iowa State Penitentiary at Fort Madison-County of Lee-State of Iowa without the assistance of counsel to transverse and deny the allegations set forth in the respondents return to show cause order in the above captioned civil case.

Not being a student of law the petitioner begs the courts indulgence to proceed in this matter to the best of my abilities and knowledge.

Petitioner states that the respondent errored in his return to order motion in naming the court (county) where the habis corpus action was started.

Petitioner further states that the respondent errored also in stating the petitioner used Section 246.26-1966 Code of Iowa as a basis for the alleged violation of constitutional rights.

Petitioner further states that the respondent did not in his return or memorandum of return answer the charges set out by the petitioner in Civil Action No. 3-869-D.

For the reasons set forth in the attached memorandum in support of transverse the petitioner shows why the writ

of habeas corpus does have merit and does show violation of the petitioner's constitutional rights by the respondent.

Respectfully submitted,

/s/ John J. Morrissey

JOHN J. MORRISSEY #29739

Petitioner

Signed and subscribed before me this 17 day of Oct. 1969:

Wm. F. Abel

Notary Public In and For

The County of Lee at

Fort Madison, Iowa

My commission expires July 4, 1972

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAYENPORT DIVISION

JOHN J. MORRISSEY #29739

Petitioner,

vs.

LOU V. BREWER, Warden I.S.P.

Respondent.

Civil No. 3-869-D
Memorandum in
Supplement of
Transverse

[Filed, Oct 20 1969, Clerk, U.S. District Court Southern
District Of Iowa]

On or about June 20th, 1968 petitioner was granted a parole from the Iowa State Penitentiary at Fort Madison, Iowa.

On or about January 31, 1969 petitioner was arrested in Linn County-City of Cedar Rapids, Iowa on a warrant namely Section 247.28 of the 1966 Code of Iowa and was placed in the Linn County Jail for a period of about two weeks without the benefit of counsel or being afforded an opportunity to make bail. Without giving the petitioner the chance to answer charges against him petitioner was then illegally returned and illegally imprisoned at the Iowa State Penitentiary at Fort Madison, Iowa. By the respondent or his agents.

By not affording the petitioner due process of law the respondent violated petitioners constitutional rights to due process of law.

ARGUMENTS FOLLOW

1. Provisions of the 14th Amendment to the United States Constitution extend to all actions of a state court denying equal protection of the laws, what so ever the agency of the state taking the action.

Avery 88 SS Ct. 1114

2. Whoever, while on parole shall violate any rule, regu-

lation or condition of said parole, shall be deemed guilty of a felony. . . . Section 247.28, 1966 Code of Iowa.

3. If the offense stated on the warrant be a felony the officer making the arrest shall take the defendant before the magistrate who signed the warrant, or in his absence, a magistrate in the county of his arrest . . . Section 757.2 1966 Code of Iowa
4. When a person is held for a public offense, if an indictment is not found against him at the regular term of court or within thirty days which ever occurs first, the court in its own motion dismiss the charge.
Section 795.1 1966 Code of Iowa
5. No person can be punished for a public offense except by a court of record having jurisdiction,
Section 687.5 1966 Code of Iowa
6. No felony or public offense can be comparrmised.
Section 794.4 1966 Code of Iowa
7. No person can be subjected to a bill of pains, nor can a prison keeper of records increase the penalty asseded by a court of records in the United States (Construed)
U.S. Constitution Article 1 Section 9, Clause 2,3
Article 1 Section 10 Clause 1
8. In cases regarding the liberty of an individual the accused shall be informed of the charges against him, shall have a chance to confront his tormenters, and shall be provided counsel (per Se)

Constitution of State of Iowa
Article 1 Section 10.

The petitioner respectfully points out to the court that in the habeas corpus application 3-869-D it was stated that previous action was in Lee County District Court. Further that in question, No. 12, Part A, of the same application, Section 247.28 was specified not Section 246.26 as stated by the respondent.

Petitioner further wishes to make clear that the hearing reffered to in said application as per question No. 12, part B is the hearing required by law as set out in point (3) three of this transverse.

page 2 of Supplement continued below

Petitioner states that when returned to the penitentiary he was given a new discharge date which added more time to his sentence and by doing this in effect did present the petitioner with a bill of pains directly associated with the felony arrest previously mentioned in point 1. The aforementioned act was done by the prison keeper of records or his agents and not in a court of records as prescribed by law. Reference to this can be made when the U.S. Supreme Court ruled on an Iowa Case and so stated that a prison keeper of records could not extend any sentence. Re: Bonner 151 U.S. 242 (Iowa) 14 S Ct. 323.

The Constitution of the United States says a person may not be deprived of his liberty without due process of law. So when a person who is arrested by an agency of the state for a felony, on a warrant for a felony, has the person imprisoned and deprived of his liberty with no chance to hear the charges against him nor face his accusers, nor have counsel, nor bail, nor exoneration at law it must clearly be and is deprived and has deprived the petitioner of equal protection of the laws afforded him in the Constitution of the United States.

Conclusion below

For the aforementioned statements of fact the petitioner prays that writ of habeas corpus be sustained and the petitioner be released forthwith from illegal confinement.

Petitioner further prays that the charge of parole violation be vacated and set aside for untimely prosecution and that the parole board of the State of Iowa be ordered to discharge the petitioner from all obligations of his parole granted June 20th, 1968, for in the absence of the violation of his constitutional rights petitioner would have been discharged before this date.

I John J. Morrissey do state under oath that the contents of the attached transverse and supplement in support of

transverse, arguments and conclusion contained in them are true and correct to the best of my knowledge and beliefs.

Respectfully,
John J. Morrissey
JOHN J. MORRISSEY #29739
Petitioner

Subscribed and sworn before me on this 17 day of Oct 1969:

Wm. F. Abel
Notary Public In and For
The County of Lee
At Fort Madison, Iowa

My commission expires July 4 1972:

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed, Oct 24 1969, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Supplement To Return

COMES NOW the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files a supplement to his previously filed Return in the above captioned matter.

The above referred to supplement consists of a copy of a case handed down on October 14, 1969, by the Supreme Court of the State of Iowa entitled *Cole v. Holliday* * which reinforces respondent's contention that notice and hearing is not required to revoke probation of an individual placed on parole.

RICHARD C. TURNER
Attorney General of Iowa

By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
State House, Des Moines, Iowa
Attorneys for Respondent

* Reported and appears at 171 N.W. 2d 603 (Iowa 1969)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT, IOWA

JOHN J. MORRISSEY #29739

Petitioner,

vs.

LOU V. BREWER, Warden

Respondent.

Civil No. 3-869-D
Supplement to
Traverse

[Filed, Oct 31 1969, R. E. Longstaff, *Clerk*, U.S. District
Court Southern District of Iowa]

Comes now the Petitioner John J. Morrissey #29739, without benefit of counsel, to file a supplement to his previously filed traverse in Civil No. 3-869-D.

On October 13th, 1969 the respondent filed a return to motion to the action (Civil #3-869-D) In the United States District Court-Davenport Division, stating the Petitioner John J. Morrissey #29739 was being held at The Iowa State Penitentiary on a mittimus supposedly issued by the District Court of Iowa, Linn County, pursuant to section 247.28 of the 1966 Iowa Code.

I have repeatedly requested a copy of that mittimus from the court agent of the respondent, But as yet six months later I still have received no copy of said mittimus. I contend that there is no such mittimus and consequently no authority for the respondent to hold legally the petitioner John J. Morrissey.

The respondent continues to evade the issues at bar that are clearly set forth in the original copy filed in this court. I have stated before the respondent has no defense for his actions and is trying to cloud the issue at bar, for some reason, by bringing before the court a completely alien matter to the point of question.

There has been a gross violation of the Iowa Code which sets forth the procedures which shall be used in any felony arrest undertaking. By the fact of that violation the constitutional right of the Petitioner to the equal protection of the laws has also been greatly violated.

Petitioner again prays to the court for the vacating and

setting aside of the charge Parole Violation (247.28) because of lack of prosecution.

Petitioner further prays that the court will order the immediate release of the petitioner from illegal confinement and an absolute release from the parole granted on June 20th, 1968. If the constitutional rights of the defendant and petitioner had not been violated he would have been discharged before this date.

For all the above reasons, Petitioner respectfully submits that the petition for Writ of Habeas Corpus be granted.

/s/ John J. Morrissey

JOHN J. MORRISSEY

Petitioner

Box 216, Fort Madison, Iowa

Subscribed and sworn before me this 29th day of October 1969:

/s/ Bernard J. Pollpeter

Notary Public In and For

Lee County-Fort Madison, Iowa

My Commission expires 4 July 1972:

Date 11-8-69 Number 29739
From John J. Morrissey
Box 316, Fort Madison, Iowa—52627

[Filed Nov 28 1969 R. E. Longstaff Clerk, U.S. District
Court Southern District of Iowa]

To Clerk of U.S. District Court
Street No. Southern District of Iowa
City Des Moines State Iowa Zip 50309

Mr. R. E. Longstaff Clerk
U.S. District Court
Southern District: In re: 3-869-D civil number.

Sir:

In answer to your letter of 11-6-69 I am enclosing the
original copy of the letter I received from Ken. L. Perry
Sr. Clerk of District Court, Linn County Iowa.

Sincerely
John J. Morrissey
29739 Box 316
Ft. Madison, Ia., 52627

Date 10-27-69 Number 29739
From John J. Morrissey
Box 316, Fort Madison, Iowa—52627

[Filed Nov 28 1969 R. E. Longstaff Clerk, U.S. District
Court Southern District of Iowa]

Kenneth Perry, Clerk
Linn Co. District Court

Sir:

I have a letter from the Attorney General of Iowa stating that on or about Jan. 31, 1969 there was a mittimus issued in District Court of Linn County Cedar Rapids Iowa, pursuant Section 247.28 of the 1966 Iowa Code. That mittimus is stated as the authority by which 29739 John J. Morrissey is being detained at the Iowa State Penitentiary at Ft. Madison, Iowa.

I would like a copy of that mittimus.

I know of the mittimus issued from the above mentioned court in the name of John J. Morrissey on Jan. 3, 1967 pursuant Section 713.3 1962 Iowa Code, and have a copy of same.

The mittimus I want a copy of was supposed to have been issued on or about Jan. 31, 1969 for the violation of Section 247.28, 1966 Iowa Code.

The need for the information about this mittimus is urgent as the case is before the court now.

Sincerely
John J. Morrissey

Mr. Morrissey:

According to our records, we did not issue a mittimus on or about January 31, 1969.

Sincerely,
Kenneth L. Perry, Sr.
KENNETH L. PERRY, SR.,
Clerk of District Court
Linn County, Iowa

KLP:cs

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Nov 28 1969, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

JOHN J. MORRISSEY,

Petitioner,

vs.

LOU V. BREWER, Warden,

Respondent.

Civil No. 3-869-D
Order

This matter is before the Court on the petition of John J. Morrissey for a writ of habeas corpus.

Return filed on behalf of the respondent herein to the Court's show cause order indicates that Morrissey is presently detained under the authority of a mittimus issued by the Linn County Iowa District Court, pursuant to the revocation of Morrissey's parole. The revocation is said to be based on Iowa Code § 247.28 (1966).

By letter, Morrissey indicates to the Court that he has information suggesting that no such mittimus exists. Included with the letters received by the Court is a letter apparently received by Morrissey and written by Kenneth L. Perry, Sr., Clerk of the Linn County Iowa District Court. Morrissey requests permission to append the foregoing information to his petition.

IT IS ORDERED:

1. That all letters of correspondence between the Clerk of the Court and the petitioner herein relating to the foregoing allegations be filed as amendments to the petition herein.

2. That the respondent have and is hereby granted twenty days from the date of this order to respond to issues arising as a result thereof.

3. That the Clerk of Court furnish copies of the aforesaid letters to the respondent along with a copy of this order.

Dated this 28th day of November, 1969.

Ray L. Stephenson
Chief Judge

11-28-69 Copy to petitioner & Atty. General.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Dec 18 1969, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Amended Return

COMES NOW the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files an Amended Return to his previously filed Return in the above captioned matter.

STATEMENT OF THE CASE

In the previously filed Return respondent stated that petitioner, John J. Morrissey, is presently being detained under authority of a mittimus issued from the District Court of Iowa, Linn County, pursuant to a revocation of his parole. Perhaps this language misleads the petitioner into believing that the Linn County District Court did or should have issued another mittimus when petitioner was taken into custody for parole violation on or about January 31, 1969. No such mittimus was issued or was required to be issued by the Linn County District Court to return the prisoner to the Fort Madison Penitentiary. The mittimus referred to in respondent's previously filed Return refers to the mittimus issued by the Linn County District Court in 1967 sentencing petitioner to a term of seven years at the Iowa State Penitentiary at Fort Madison, Iowa.

In answering the petitioner's Traverse, filed October 20, 1969, the respondent files this Amended Return in hopes that it will clear up some of the confusion the petitioner seems to be laboring under, and hereby amends his Return and states as follows:

ARGUMENT

That the petitioner entered a plea of guilty on January 5, 1967, in the District Court of Iowa, Linn County, to a charge of False Drawing or Uttering of Checks in violation of Section 713.3 of the 1962 Code of Iowa. He was sentenced to a term of seven years at the Iowa State Penitentiary, Fort Madison, Iowa, and a mittimus was issued by the Linn County District Court pursuant to such sentencing. Said mittimus was the mittimus referred to in respondent's previously filed Return.

That on June 20, 1968, the petitioner was granted a parole from the Iowa State Penitentiary at Fort Madison, Iowa, and on or about January 31, 1969, the petitioner was arrested for parole violation and was returned to the Iowa State Penitentiary at Fort Madison.

That petitioner contends that he is presently being unlawfully detained at the Iowa State Penitentiary at Fort Madison, Iowa, because there was no mittimus issued for his return to the Penitentiary subsequent to his arrest for parole violation in January of 1969.

That the Linn County District Court was not required, nor did it, issue a mittimus pursuant to petitioner's return to the Fort Madison Penitentiary subsequent to petitioner's arrest on or about January 31, 1969, on the charge of parole violation. In the instant case, the authority for returning petitioner to the Fort Madison Penitentiary was a warrant issued by the Parole Board to apprehend and return the petitioner to the Penitentiary because he violated provisions of his parole, a copy of said warrant being attached to this Amended Return.

That it is the policy of the Iowa Board of Parole that it may execute a warrant for the arrest of an individual it has paroled if said individual has violated his parole, and such warrant is authority for apprehending such parole violator and returning him to the Penitentiary. This is done without any mittimus being issued by any court in the county wherein the parole violator is arrested prior to his return to the Penitentiary for parole violation. It should be noted that Section 247.9, 1966 Code of Iowa pertains to this matter and provides in part that:

"All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of said board, and shall be sub-

ject at any time, to be taken into custody and returned to the institution from which they were paroled."

That since there was a warrant executed on the petitioner by the Parole Board for parole violation; and since the petitioner was in the legal custody of the respondent, Warden and under the control of the Parole Board, while petitioner was on parole, pursuant to Section 247.9, 1966 Code of Iowa, there was no reason and no requirement that the Linn County District Court should issue a mittimus for petitioner's return to the Iowa Penitentiary at Fort Madison, Iowa.

That petitioner alleges he should have had a hearing when he was arrested for parole violation on or about January 31, 1969. This issue was covered in the respondent's previously filed Return and then subsequently in respondent's Supplement to Return wherein the case of *Cole v. Holliday*, — Iowa —, 171 N.W.2d 603, was cited which reinforced respondent's contention that notice and hearing was not required to revoke probation of an individual placed on parole.

That the respondent hereby amends page 2, line 3, of his previously filed Memorandum in Support of Return (Civil No. 3-869-D, filed October 13, 1969) by changing "Section 246.26, of the 1966 Code of Iowa" to read "Section 247.28, of the 1966 Code of Iowa."

That the respondent hereby amends page 1, line 11, of his previously filed Memorandum in Support of Return (Civil No. 3-869-D, filed October 13, 1969) by changing the word "Linn County" to "Lee County." Such amendment refers to the county wherein petitioner filed his first habeas corpus action in this matter.

Respectfully submitted,

RICHARD C. TURNER

Attorney General of Iowa

By Michael J. Laughlin

MICHAEL J. LAUGHLIN

Assistant Attorney General

Attorneys for respondent

Iowa Board of Parole
Des Moines

[Filed 1969 JUN 25 AM 9:22, District Court, Lee County,
Iowa, Lyle B. Miller, Clerk

STATE OF IOWA ss.
County of Polk.

Know All Men by These Presents:

That JOHN J. MORRISSEY, #29739-FM was on the 5th day of JANUARY 1967, convicted in the District Court of LINN County and State of Iowa, of the crime of FALSE CHECK; LARCENY; DESERTION and was sent to the IOWA STATE PENITENTIARY at FORT MADISON, IOWA; that said JOHN J. MORRISSEY was admitted to said IOWA STATE PENITENTIARY on the 6th day of JANUARY, 1967, that in accordance with the provisions of Chapter 192, of the Acts of the Thirty-second General Assembly of Iowa, approved April 2, 1967, and the rules adopted by the Board of Parole; said JOHN J. MORRISSEY was on the 20th day of JUNE, 1968, paroled by said Board of Parole, to go outside of the buildings and enclosure of said IOWA STATE PENITENTIARY, upon the conditions stipulated in a certain parole agreement, executed in duplicate, and signed by said parolee.

AND WHEREAS it has come to the knowledge of the Board of Parole that said JOHN J. MORRISSEY has violated the conditions of said parole agreement and has thereby forfeited his right to remain longer on parole, therefore, it is hereby ordered by said Board that said JOHN J. MORRISSEY be forthwith arrested and returned to said IOWA STATE PENITENTIARY to serve as much of the remainder of his sentence as said Board shall hereafter determine.

It is further ordered that Warden's Authorized Officer, or any Sheriff or Peace Officer of the State of Iowa be and he is hereby authorized and directed to arrest said JOHN J. MORRISSEY whenever and wherever found, and return him to the said IOWA STATE PENITENTIARY

WITNESS the Board of Parole
of the State of Iowa by its Chair-
man and Secretary, at Des Moines,
this 31st day of JANUARY, A.D.
1969.

Illegible

Chairman,

Certified by Illegible

Secretary.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Dec 23 1969, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner.

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Order

This matter is before the Court on the petition of John J. Morrissey, hereinafter referred to as petitioner, for a writ of habeas corpus.

Petitioner has alleged, among other things, that when he was returned to the penitentiary following his arrest for parol violation he was given a new discharge date which added more time to his sentence. Petitioner seems to believe this action was taken pursuant to Iowa Code § 247.28 (1966).

The Court notes that respondent has not addressed himself to this issue raised by petitioner.¹

Therefore, IT IS ORDERED that the respondent shall, within ten days of the date of this order, file a supplemental response addressed to the issue heretofore described.

IT IS FURTHER ORDERED that petitioner shall have an additional ten days thereafter to file a supplemental traverse thereto.

Dated this 23rd day of December, 1969.

RAY L. STEPHENSON
Chief Judge

12-23-69 Copy to Petitioner & Atty. Gen'l.

¹ The Court does not know, for example, whether this issue has been presented to the state courts.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Jan 5 1970, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner.

vs.

Civil No. 3-869-D
Supplement to Return

LOU V. BREWER, Warden,
Respondent.

COMES NOW the respondent Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files a supplement to his previously filed Return in the above captioned matter.

STATEMENT OF THE CASE

In a previously filed memorandum in support of a previously filed Return the respondent stated the facts of this case and will set them forth again.

On January 5, 1967, the petitioner entered a plea of guilty in the District Court of Iowa, Linn County, to the charge of False Drawing or Uttering of Checks in violation of Section 713.3, of the 1962 Code of Iowa. He was sentenced to a term of seven years at the Iowa State Penitentiary, Fort Madison, Iowa. On June 20, 1968, petitioner was granted a parole from the Iowa State Penitentiary. On January 31, 1969, the petitioner was arrested for parole violation and was returned to the Iowa State Penitentiary, Fort Madison, Iowa. Petitioner applied for a writ of habeas corpus in the District Court of the State of Iowa, Lee County, Iowa, which application was denied on the 26th day of June, 1969; a copy of which order denying petitioner's writ is attached hereto. Petitioner then sought appeal to the Supreme Court of the State of Iowa and said appeal was dismissed on September 15, 1969, on motion by the State a copy of which motion and order dismissing the appeal is attached to this supplemental return. The Iowa Supreme Court dismissed the petitioner's

appeal without considering the merits of petitioner's appeal.

ARGUMENT

Respondent has previously filed in this matter, an amendment to his previously filed Return, wherein respondent reaffirmed the argument presented in his previously filed Return. The petitioner in this case entered a plea of guilty in the District Court of Iowa, Linn County, to a charge of False Drawing or Uttering of Checks in violation of Section 713.3 of the 1962 Code of Iowa, and was sentenced to a term of seven years at the Iowa State Penitentiary, Fort Madison, Iowa. On June 20, 1968, petitioner was granted a parole from said institution, and on or about January 31, 1969, the petitioner was arrested in Linn County for parole violation and was subsequently returned to the Fort Madison Penitentiary pursuant to a warrant issued by the Parole Board, a copy of which has been filed with this court in Respondent's Amended Return. The Parole Board was acting in pursuance to Sections 247.26 and 247.28 of the 1966 Code of Iowa which provides:

"247.26 Revocation of probation. A suspension of a sentence by the court as herein provided may be revoked at any time, without notice, by the court or judge, and the defendant committed in obedience to such judgment.

"247.28 Violation of Board parole. Whoever, while on parole, shall violate any condition of his parole, or any rule or regulation of the board granting the parole, shall be deemed guilty of a felony, and shall be punished by imprisonment in the institution from which he had been paroled, for a term of not more than five years, his sentence under such conviction to take effect upon the completion of his previous sentence."

No mittimus was issued out of the Linn County District Court for the petitioner's return to Fort Madison penitentiary for parole violation, and no mittimus was required to be issued for the reasons stated in respondent's argument in his previously filed Amended Return. Also no hearing was held or required to be held regarding the issue of petitioner's parole violation. The authority for

not having such a hearing follows a long line of Iowa cases on that issue and is reaffirmed in the case of *Cole v. Holliday*, — Iowa —, 171 N.W.2d 603, a copy of which was filed with this court in the instant case in respondent's previously filed Supplement to Return.

The respondent has filed a number of papers with this court in an attempt to answer the issues raised by the petitioner and respondent believes he has adequately answered petitioner's contentions in respondent's previously filed Return, Supplement to Return, and Amended Return.

CONCLUSION

For all of the above reasons, respondent respectfully submits that the petition for writ of habeas corpus should be denied.

Respectfully submitted,

RICHARD C. TURNER

Attorney General of Iowa

By Michael J. Laughlin

MICHAEL J. LAUGHLIN

Assistant Attorney General

Attorneys for respondent

IN THE SUPREME COURT OF IOWA

JOHN J. MORRISSEY,

Petitioner

v.

LOU V. BREWER,

Warden of Iowa State Penitentiary,

Respondent

Order
Denying Writ
of Habeas Corpus

The petition of John J. Morrissey, filed here July 8, 1969 for a writ of habeas corpus, together with the papers attached thereto, have been duly considered. The said petition is hereby denied for the following reasons:

1. The petition is not made to the court or judge most convenient in point of distance to the petitioner, as required by sections 663.4 and 663.5 Iowa Code.

2. The legality of petitioner's imprisonment has already been adjudged by prior proceedings of the same character, as appears from the papers attached to the petition filed herein, and if petitioner is entitled to any relief his remedy would be to appeal from the denial of his petition by the District Court of Lee County.

This order is appended to petitioner's file herein and returned to petitioner, as provided by Code section 663.7.

DONE this 25th day of July, 1969.

Supreme Court of Iowa
By /s/ T. G. Garfield
Chief Justice

IN THE SUPREME COURT OF IOWA

[Filed Sep 15 1969, Helen M. Lyman, Clerk, Supreme Court]

JOHN J. MORRISSEY,

Petitioner

v.

LOU V. BREWER, Warden,

Respondent

No. 53826

Order

Respondent's motion to dismiss the above entitled appeal is sustained. Appeal dismissed.

Done this 15th day of September, 1969.

T. G. GARFIELD

Chief Justice—Iowa Supreme Court

Copies mailed to David A. Elderkin, Asst. Atty. Gen.
Austin J. Rashid, Fort Madison, Iowa

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Jan 9, 1970, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

JOHN J. MORRISSEY,

Petitioner

Civil: No. 3-869-D

Supplement to traverse

LOU V. BREWER, Warden

Respondent

Comes now John J. Morrissey, petitioner, without benefit of counsel, and hereby files supplement to his previously filed traverse in the above named action.

STATEMENT OF THE CASE

In a previously filed traverse and in the support of same petitioner states that he was sentenced in Linn County District Court (mittimus attached). On June 20, 1968, petitioner was paroled by the Parole Board of the state of Iowa. That parole was revoked and petitioner was returned to the Iowa Penitentiary without benefit of DUE PROCESS OF LAW and was denied the equal protection of the laws.

ARGUMENT

The attached mittimus being an absolute judgement of conviction, not an Alternative or Conditional judgement, the respondent nor any of his agents have the legal right to improve or extend such judgement. But as the facts show this has been done, without jurisdiction, and the excess attributed to a violation of code #247.28 (1966 Iowa). Respondent claims authority to do this is a policy of the Board of Parole. Prohibitions of the fourteenth amendment extend to all agencies of the state denying due process of law. Yet, respondent claims the policy of the Board of Parole, a state agency, has the power to usurp the constitutional rights of persons by having them arrested and imprisoned on a warrant, not a judgement of conviction, from a court of proper jurisdiction. A person cannot be adjudged

guilty of a public offense except by a Court of Record, according to the laws. Still, again as a matter of fact, the respondent holds that the Board of Parole and its policies can supplant a court of jurisdiction and wantonly deprive persons of their liberty, at their own personal whim, without benefit of exoneration at law. Respondent claims that no action of a court is needed in the, and I quote "revocation of one's probation while on parole". It is an impossibility to perform this action. Probation and Parole are two completely different actions, originating at two different points and by two different bodies. Probation is granted by the Court of proper jurisdiction, while Parole is granted by the Board of Parole. When one's probation is revoked, even by the Board of Parole, a judgement of conviction is signed by the proper Court and proceeds with the person named thereon to the proper place of confinement as an authority for the Warden of that institution to hold such person until said sentence is completed or the person is released by parole. There is statutory provision made to do this. Statutory provision is also made for the revocation of one's parole but the DUE PROCESS OF LAW is circumvented by the Board of Parole in the returning of a parolee, without benefit of his constitutional rights, to an institution that illegally accepts the parolee on a warrant instead of a judgement of conviction as prescribed by law.

Petitioner has stated before that the respondent keeps clouding the issue before the Court by bringing into the issue the unrelated topic of Probation. Respondent has repeatedly cited Court precedents in connection with Probation. Probation and Parole are two different actions and are dealt with by the Code of Iowa as two separate actions both as to their instigation and demise. The revocation of a Parole is a felony and there is provision in law for the arrest and conviction of felonies. But these provisions are supplanted by the policy of a state agency namely the Board of Parole and are condoned and adhered to by the respondent as Warden of the penitentiary.

Respondent has not answered the allegations set forth in the original application for Writ of Habeas Corpus to this Court, even after being asked to by the court. Respondent has no legal reason for his actions in the detention of petitioner. Respondent by his actions has rendered the revocation of the petitioner's parole untimely as pre-

scribed by law therefore has no authority to imprison or detain said petitioner.

CONCLUSION

For the aboved stated reasons petitioner respectfully submits that the Writ of Habeas Corpus should be granted and petitioner freed from illegal confinement.

Respectfully submitted,
John J. Morrissey
Petitioner
29739 Box 316
Fort Madison, Iowa.

Subscribed to and sworn before me this 7th day of Jan 1970.
Notary in and for
Lee County, Ft. Madison, Ia.

Wm. T. Abel

My commission expires July 4, 1972.

ATTACHED DOCUMENTS:

ONE(1) JUDGEMENT OF CONVICTION(LINX
COUNTY DISTRICT COURT)

ONE(1) INMATE MEMO STATING DISCHARGE
DATES OF PETITIONER IN SUPPORT
OF AFOREMENTIONED ALLEGATION
THAT THE SAME WAS EXTENDED BY
RESPONDENT.

Iowa State Penitentiary

INMATE MEMO

From Morrissey 29739 17-H-1 Date 12-29-69

NAME NUMBER CELL HOUSE

To: Record Clerk I request an

A copy of my original mittimus issued by Linn County.

My original discharge date on that mittimus. My discharge date now. (After my return on parole violation.)

I need these for use in a legal proceedings.

DO NOT WRITE BELOW THIS LINE

Date Received

Remarks: Original Discharge Date: August 6, 1970

Present Discharge Date: January 20, 1971

C. E. Wilkens

R. C.

MITTIMUS. To be made in duplicate.

(One copy for Warden.)

(One copy to be returned to Clerk.)

STATE OF IOWA,
LINN COUNTY.

ss.

In the District Court of said County, at the October Term, A.D. 1966 Present: the Honorable William R. Eads Judge of the Eighteenth Judicial District; Walter H. Grant, Sheriff, and Kenneth L. Perry, Sr., Clerk of said Court.

STATE OF IOWA,

vs.

No. 21861, Criminal Docket

JOHN J. MORRISSEY

The State of Iowa to the Sheriff of said County, Greeting:

Whereas, at a Term of the District Court in and for said County, began and held at the Court House in the City of Cedar Rapids, in said County, on the 3rd day of October, A.D. 1966; on the 13th day of December A.D. 1966 John J. Morrissey was informed against of the crime of False Uttering of a Check (Sec. 713.3, 1966 Code of Iowa) (a True Information was filed, charging the defendant with the crime of False Uttering of a Check) and on the 3rd day of January A.D. 1967 said John J. Morrissey pled guilty of the crime of False Uttering of a Check (Sec. 713.3, 1966 Code) and on the 5th day of January A.D. 1967, was sentenced to be confined in the Iowa State Penitentiary at Fort Madison in said State, for the term of not exceeding at Seven (7) Years from date of admittance, at hard labor, as provided under Section 713.3 and 713.1 of the 1966 Code of Iowa, and to pay the costs of prosecution taxed at \$27.25. Sentence to be served concurrently with sentences in Causes No. 21781 and 21518.

WE THEREFORE COMMAND YOU, that you take the body of the said John J. Morrissey now confined in the jail of said County, and convey him to the Iowa State Penitentiary at Fort Madison, in said State, therein to be confined in accordance with the sentence aforesaid; and we

also command the Warden of the Iowa State Penitentiary at Fort Madison aforesaid to receive the body of the said John J. Morrissey and him confine in the said State Penitentiary for the term of not exceeding Seven (7) Years at hard labor, and for so doing this shall be his sufficient warrant.

Appeal Bond fixed at \$1,000.00. Dollars

In TESTIMONY WHEREOF, I Kenneth L. Perry, Sr., Clerk of our District Court aforesaid, have hereunto set my hand and affixed the seal of said Court, this 6th day of January A.D. 1967

KENNETH L. PERRY, SR.
Clerk

By Illegible
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Jan 23 1970, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

JOHN J. MORRISSEY,

Petitioner,

vs.

LOU V. BREWER, Warden,

Respondent.

Civil No. 3-869-D

Supplement to return

COMES NOW the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files a supplement to his previously filed Return, Amendment to Return, and Supplement to Return in the above captioned matter.

STATEMENT OF THE CASE

In a previously filed memorandum in support of a previously filed Return the respondent stated the facts in this case.

ARGUMENT

Petitioner contends that his parole was revoked without any type of judicial hearing and thus he was denied his constitutional rights. No hearing or judicial determination is required to revoke a petitioner's parole and to return him to prison. The latest Iowa Supreme Court case on point is *Cole v. Holiday*, — Iowa —, 171 N.W. 2d 603, a copy of which has been filed by the respondent in this court.

Petitioner further contends that upon revocation of his parole and return to prison, he was given a new discharge date. Petitioner contends that this was illegal and violated his constitutional rights.

Section 247.12, 1966 Code of Iowa, provides:

"The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole be violated"

When an individual's parole is revoked, the time he spends on parole does not count toward his sentence and thus when the individual is returned to the institution, his discharge date is naturally moved forward to add to his sentence the time the petitioner was out on parole. This occurred in the instant case pursuant to authority of Section 247.12, 1966 Code of Iowa, and in no way violates petitioner's constitutional rights as he so contends.

The respondent has filed a number of papers with this court in an attempt to answer the somewhat confusing issues raised by the petitioner and respondent believes he has adequately answered petitioner's contentions in respondent's previously filed Return and supplements thereto.

CONCLUSION

For all the above reasons, respondent respectfully submits that the petition for writ of habeas corpus should be denied.

Respectfully submitted,

RICHARD C. TURNER

Attorney General of Iowa

By Michael J. Laughlin

MICHAEL J. LAUGHLIN

Assistant Attorney General

Attorneys for respondent

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Feb 5 1970, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

JOHN J. MORRISSEY

Petitioner

vs.

Civil No. 3-869-D

Supplement to Traverse

LOU V. BREWER, Warden

Respondent

Comes now before the court in the aboved named case, without benefit of counsel, to respectfully inform the court of the following facts.

While acting in his quasi-judicial position one Harold Cerveny, parole agent in and for the Linn County, Iowa district, with the cooperation and affirmance of Harold Moore, Chairman of the Parole Board, and Russell Bobzin secretary to the Parole Board, did cause the petitioner to be arrested for a violation of section 247.28 (1966 Ia. Code) with a warrant on or about 1-31-69.

Petitioner was not afforded his rights as set forth in the constitution of the United States, by the fact that he was arrested, jailed, held without bond, was denied right to counsel, exonerated at law, the judicial process used in a arrest where warrant stated offense was a felony as stated in the Iowa Code (1966), was returned to prison without benefit of a judgement of conviction.

Authorities listed hereto should be ample proof that a person under the Constitution of the United States does not waive his rights to due process or the equal protection of the laws.

Since there was no valid or legal revocation of parole as stated in section 247.28 (1966 Ia. Code) there can be no extension of sentence as stated by Respondent.

Petitioner was paroled and granted his liberty from the original judgment of conviction (1-6-67) by the Board of Parole on 6-20-68 and that parole, never having been revoked as prescribed by law, is still valid. Hence petitioner

was deprived of his liberty by the arbitrary actions of the Parole Board and the Respondent does not have valid reason for the illegal detention of petitioner.

The U.S. Supreme Court has ruled that any actions taken after an illegal act but in conjunction with the illegal act become illegal also. Since there was no valid revocation of parole as prescribed by law any actions that are incident to the revocation are null and void.

Any custom or usage of a state statute that denies due process or equal protection of the laws is in violation of the Federally guaranteed rights under the U.S. Constitution fourteenth amendment section one.

The custom or policy of the Parole Board of denying a person his right to due process does create an unequal protection of the laws and is in violation of the U.S. Constitution.

AUTHORITIES

Persons convicted of a felony may lose some rights and privileges of law abiding citizens, but do not lose all rights and the DUE PROCESS AND EQUAL PROTECTION clauses follow them to prison.

Jackson vs. Bishop D.C.Ark.1967 268 F.Supp.804
DUE PROCESS AND EQUAL PROTECTION of the laws are guaranteed not only to citizens but to all persons, including one who allegedly is not technically a "citizen" because of a conviction of a felony.

Gordon vs. Garrison D.C.Ill.1948 77 F.Supp.477
DUE PROCESS AND EQUAL PROTECTION of the laws of U.S.C.A. Const. Amend. Fourteen section one are guaranteed not only to citizens but to all persons.

Sellers vs. Johnson D.C.Iowa1946 69 F.Supp.778

CONCLUSION

For the above mentioned reasons, Petitioner respectfully submits to the Court, Petitioner believes that he was denied his rights as a person under the constitution of the U.S. and

prays the Court for relief from illegal confinement by the Respondent and a discharge from parole issued on 6-20-68.

Respectfully
s/ John J. Morrissey
29739 Box 316
Fort Madison, Iowa

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

CIVIL No. 3-869-D
ORDER

[Filed, Mar. 25 1970; R. E. Longstaff, *Clerk*, U.S. District
Court Southern District of Iowa]

This matter is before the Court on the petition of John J. Morrissey, hereinafter referred to as petitioner, for a Writ of habeas corpus. Petitioner is currently an inmate of the Iowa State Penitentiary at Fort Madison, Iowa.

It appears from papers now on file with the Court that petitioner was originally sentenced to seven years confinement in the Iowa State Penitentiary by the Iowa District Court for Linn County on his plea of guilty to a charge of false drawing and uttering of checks in violation of Iowa Code § 713.3 (1962). Subsequent to his incarceration, petitioner was paroled from the institution. Thereafter, on January 31, 1969, he was arrested for parole violation and returned to the penitentiary. Thereupon, petitioner's original discharge date of August 6, 1970 was replaced on the prison records with a new discharge date of January 20, 1971.

Petitioner complains (1) of his arrest and return to prison without necessary judicial safeguards, (2) of the change in the date of his discharge without adequate authority therefor, and (3) because he was never prosecuted for a felony as provided by Iowa Code § 247.28.

The Court notes that the present state of the petition and other papers now on file is such that pertinent information relating to the case is not available to the Court. It would be helpful if the Court possessed authentic copies of the various documents now in possession of the state relating to the revocation of petitioner's parole. Also needed are copies of the papers filed in connection with

petitioner's state habeas corpus proceedings and a copy of any transcript of record made at any hearings had therein.

It Is ORDERED that counsel for the respondent, within fifteen days of the date of this order, file with the Court authentic copies of all papers in possession of the state relating to the revocation of petitioner's parole.

It Is FURTHER ORDERED that counsel for respondent, within fifteen days of the date of this order, file with the Court copies of all papers filed in connection with the petitioner's state habeas corpus proceedings and copies of any transcripts of testimony made at any hearings conducted therein.

Dated this 25th day of March, 1970.

/s/ Ron N. Stephen
CHIEF JUDGE

3-25-70 Copy mailed to Petitioner & Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,

Petitioner

vs.

LOU V. BREWER (Warden),

Respondent

Civil No. 3-869-D

Petition for amendment to
original petition

[Filed, April 1 1970, R. E. Longstaff, Clerk, U.S. District
Court Southern District of Iowa]

Comes now the Petitioner in the above mentioned case, without benefit of counsel. It is the desire of the Petitioner to respectfully request of the Court permission to amend to the original Petition which is on file now in this Court.

In support of the Petitioners' allegation in his original Petition to the Court that he was denied DUE PROCESS OF LAW when he was imprisoned by the State Board of Parole and the Respondent following the Petitioners arrest for parole violation (247.28-1966 Iowa) on or about 1-31-69.

It is held by the United States Supreme Court: Because trial by jury in criminal cases is fundamental to the American scheme of justice, the fourteenth amendment guarantees the right of jury trial in all criminal cases which were they to be tried in federal court, would come under or within the Sixth Amendments guarantee. The right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by states as part of their obligation to extend DUE PROCESS OF LAW to all persons within their jurisdiction.

The penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and in it self shall subject trial of State criminal cases to mandates of Sixth Amendments jury trial provisions.

A crime punishable by two years in prison is a serious crime and not a petty offense, so that Sixth and Fourteenth Amendments require State to grant jury trials. (DUNCAN VS. STATE OF LA., 88 S Ct. 1444)

In view of the fact that the crime of parole violation in

the State of Iowa (247.28-1966 Iowa) is punishable by a greater penalty than the above mentioned case, Petitioners allegation of denial of DUE PROCESS in the instant case has been confirmed and upheld by the U.S. Supreme Court.

Respectfully submitted, on this date 3-30-1970
by Petitioner,

/s/ John J. Morrissey 29739

4-1-70 copy mailed to Atty. General.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner.

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Requested Documents Con-
cerning Petitioner's Parole
Revocation and State
Habeas Corpus
Proceedings

[Filed, Apr 10 1970, R. E. Longstaff, *Clerk*, U.S. District
Court Southern District of Iowa]

COMES NOW the respondent, Lou V. Brewer, Warden,
Iowa State Penitentiary, Fort Madison, Iowa, by his at-
torneys and hereby files the following documents and/or
papers regarding the petitioner's parole revocation and
his subsequent habeas corpus petition in the Lee County
District Court of Iowa concerning the same.

Respectfully submitted,
RICHARD C. TURNER
Attorney General of Iowa

By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
State House, Des Moines, Iowa

Attorneys for Respondent

IN THE DISTRICT COURT OF IOWA
IN AND FOR LEE COUNTY

JOHN J. MORRISSEY, *Petitioner,*

vs.

LOU V. BREWER, Warden of
Iowa State Penitentiary, *Respondent.*

Petition for a
Writ of
Habeas Corpus

[Filed, 1969 Jun 25 AM 9 22, District Court; Lee County,
Iowa, Lyle B. Miller, *Clerk*]

Comes now John J. Morrissey 29739, petitioner above named, first being duly sworn upon oath; makes this application, praying for a Writ of Habeas Corpus, and does depose and state that:

1. I am unlawfully and illegally restrained of my liberty and confined within the Iowa State Penitentiary at Fort Madison, Iowa, in custody of the Respondent herein.
2. That the cause or pretense for such a restraint and imprisonment to the best of my knowledge and belief is a "Mittimus" derived from the Judge of the Linn County District Court, Cedar Rapids, Iowa, entered the 5th day of January, 1967. (Mittimus attached)
3. I allege and state that such restraint is illegal, in violation of the 6th, 13th and 14th Amendments of the Constitution of the United States and of the State of Iowa.
4. I have never before submitted any kind of application to this or any other court in these United States for the relief sought herein.
5. And, that a copy of this petition has been mailed by U.S. Mails to the respective offices of the interested parties in this litigation.

HISTORY OF CASE

On the 5th day of January 1967, the petitioner was convicted on a plea of guilty for the violation of Section 713.3 of the 1962 Iowa Code.

On the same date, petitioner was sentenced for the afore-said crime to a term of seven (7) years at the Iowa State Penitentiary, Fort Madison, Iowa.

On the 20th day of June, 1968 petitioner was granted a parole from the Iowa State Penitentiary and on the 31st day of January 1969 petitioner was arrested for parole violation and was returned to the Iowa State Penitentiary.

POINT 1

Petitioner contends that his constitutional rights that are accorded him by the United States Constitution and the Constitution of the State of Iowa have been and are now violated in view of the fact that he was deprived of a hearing with or without counsel at the times that he was arrested for the revocation of his parole. Petitioner contends that a hearing should have been held to determine whether his parole status was legally revoked according to law and not upon presumption and hearsay alone.

Petitioner contends that no hearing was held at the revocation proceedings with petitioner or his counsel being present, nor was petitioner advised of the said hearing, if held. Petitioner was not advised of his right to counsel at every stage of the proceedings.

Petitioner further contends that his constitutional rights were violated when he was arrested for violation of parole regulations, Section 247.28, 1962 Iowa Code, in that he was "deemed guilty of a felony" and yet was not formally arraigned, allowed to be represented by counsel or afforded "due process" in accordance with the United States Constitution and the Constitution of the State of Iowa.

AUTHORITIES

6th Amendment, U.S. Constitution

14th Amendment, U.S. Constitution

Gideon v. Wainright, 372 U.S. 335, 83 S.Ct. 72, 9 L. Ed. 2d 799, etc.

Pointer v. Texas, 85 s. Ct. 1065.

Mempha v. Rhay, 88 s. Ct. 254 (1967)

Article 1, Chapters 9 and 10, 1962 Iowa Code

ARGUMENT FOR POINT ONE

Petitioner was denied a revocation hearing and was denied counsel to represent him at said hearing that was conducted behind closed doors by the State Board of Parole. *Mempha v. Rhay, Id., Gideon v. Wainright, Id.*

Petitioner was also denied the right to confront his accusers of the alleged violation of his parole. *Pointer v. Texas, Id.*

PRAYER

Petitioner prays that this court sustain the petition herein and issue an Order to the Respondents herein directing that he immediately release petitioner from illegal confinement in the best interest of justice in view of the fact that rights to "due process" have been violated.

IN THE DISTRICT COURT OF THE STATE OF
IOWA, IN AND FOR LEE COUNTY, AT
FORT MADISON

JOHN J. MORRISSEY,
Petitioner,

vs:

Civil Case No. 15212
Order

LOU V. BREWER, Warden
Iowa State Penitentiary
Fort Madison, Iowa,
Respondent.

[Filed, 1969 Jun 26, District Court Lee County, Iowa
Lyle B. Miller, Clerk]

The petitioner's application for a writ of habeas corpus, filed herein on June 25th, 1969, has been submitted to the Court.

In his petition, the petitioner contends that his parole was revoked by the Board of Parole without a hearing and without appointment of counsel.

The Sixth Circuit Court of Appeals in the case of *Rose vs. Haskins* 388 F 2d 91, a 1968 case, reviewed the dismissal of a habeas corpus petition and held that one returned to imprisonment as a parole violator is not entitled to a hearing or a judicial review of the actions of the State Parole Board in revoking the petitioner's parole. The court found no merit in the contention of the petitioner that he was entitled to be confronted by his accusers, or that he was entitled to the appointment of legal counsel and to receive a trial by jury. To the same effect, see *Hutchinson vs. Patterson* 267 F Supp 433 (1967); *U.S. vs. Hartsell* 277 F Supp 933 (1967); *U.S. vs. Brierly* 288 F Supp 401 (1968); and *Petition of Du Bois* 445 P 2nd 354. See also the Iowa case of *Curtis vs. Bennett* 256 Iowa 1164; 131 N.W. 2d 1.

In several of these cases, the case of *Mempa vs. Rhay* 389 U.S. 128, decided by the United States Supreme Court in 1967, is distinguished, and it is noted that the Mempa case involved a procedure whereby sentencing was deferred for a period of time. This is not similar to the petitioner's case

as indicated in the petitioner's application for a writ of habeas corpus.

It is accordingly ordered that the petitioner's application for a writ of habeas corpus be, and the same is, hereby denied.

Dated this 26th day of June, A. D., 1969.

William S. Cahill

Judge of District Court
First Judicial District

IN THE DISTRICT COURT OF THE STATE OF
IOWA, IN AND FOR LEE COUNTY,
AT FORT MADISON

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden
Iowa State Penitentiary
Fort Madison, Iowa,

Respondent.

Civil Case No. 15212
Order

[Filed, 1969 Aug 4, District Court Lee County, Iowa Lyle
B. Miller, Clerk]

IT IS HEREBY ORDERED That Austin J. Rashid, Attorney
at Law, Fort Madison, Iowa be and he is hereby appointed
to assist the petitioner in the preparation of his appeal in
the above matter.

Dated this 4th day of August, A.D., 1969.

J. R. Leary
Judge of District Court
First Judicial District

IN THE DISTRICT COURT OF THE STATE OF
IOWA IN AND FOR THE LEE COUNTY
AT FORT MADISON

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden
Iowa State Penitentiary
Fort Madison, Iowa
Respondent.

Civil Case No. 15212
Notice of Appeal to
Supreme Court.

[Filed, 1969 Aug 11; District Court Lee County, Iowa
Lyle B. Miller, *Clérk*]

TO: LOU V. BREWER, Defendant; and
LYLE B. MILLER, Clerk of said Court:

The above named Petitioner hereby appeals to the Supreme Court of Iowa from the Order entered herein on June 26, A.D., 1969 denying Petitioner's application for a Writ of Habeas Corpus. And you are notified that said appeal will be heard before said Supreme Court at the State House in Des Moines, Iowa, as provided by law and the rules of said Court.

Austin J. Rashid
AUSTIN J. RASHID
619-7th Street
Fort Madison, Iowa
Attorney for Petitioner.

CLERK'S CERTIFICATE

I hereby certify that the foregoing Notice of Appeal was filed in my office by Petitioner-Appellant on the 11th day of August, 1969 and the filing thereof noted in the proper docket; and that I did on the 11th day of August, 1969

mail or deliver a copy of said notice to each of the following named parties at the addresses noted below:

Box 316 Iowa State
Penitentiary
Fort Madison, Iowa
Clerk Supreme Court
Attorney General's Office

Mr. John J. Morrissey 29739

Lyle B. Miller, Clerk of the
District Court of Lee
County, Iowa

By Mary Mc Murry
Deputy

STATE OF IOWA

THE STATE OF IOWA, to the District Court of the County of
and State aforesaid:

WHEREAS, There was certified to the SUPREME COURT
of the State of Iowa, the record and proceedings in a certain
cause which was in said District Court, the parties thereto
being

JOHN J. MORRISSEY

Plaintiff, and,

LOU V. BREWER, Warden

Defendant.

[Filed, 1969 Sep 18, District Court Lee County, Iowa
Lyle B. Miller, Clerk]

wherein there was an appeal from the order and judgment
rendered in the District Court to the SUPREME COURT,
and the said Court having duly examined the record and
proceedings aforesaid, in the premises, at Des Moines, in
said state, on 15th day of September, 1969, did DISMISS
APPEAL.

THEREFORE, You are hereby commanded that with dili-
gence and according to law you proceed in the same manner
as if no appeal had been taken and prosecuted in this
COURT, anything in the record or proceedings aforesaid
heretofore certified to, the contrary notwithstanding.

IN WITNESS WHEREOF, I have hereunto set my hand and
affixed the Seal of said COURT. Done at Des Moines this
17th day of September A. D. 1969.

Helen M. Lyman

Clerk of Supreme Court

By

Deputy.

STATE OF IOWA

[Filed, 1969 Oct 3, District Court Lee County, Iowa
Lyle B. Miller, Clerk]

THE STATE OF IOWA, to the District Court of the County of
LEE and State aforesaid:

WHEREAS, There was certified to the SUPREME COURT
of the State of Iowa, the record and proceedings in a certain
cause which was in said District Court, the parties thereto
being

JOHN J. MORRISSEY

Plaintiff, and,

LOU V. BREWER, Warden
State Penitentiary, Fort Madison

Defendant,

wherein there was an appeal from the order and judgment
rendered in the District Court of the SUPREME COURT;
and the said Court having duly examined the record and
proceedings aforesaid; in the premises, at Des Moines, in
said state, on 25th day of July, 1969, did DENY WRIT.

THEREFORE, You are hereby commanded that with dili-
gence and according to law you proceed in the same manner
as if no appeal had been taken and prosecuted in this
COURT, anything in the record or proceedings aforesaid
heretofore certified to the contrary notwithstanding.

IN WITNESS WHEREOF, I have hereunto set my hand and
affixed the Seal of said COURT. Done at Des Moines this
2nd day of October A.D. 1969

Helen M. Lyman
Clerk of Supreme Court

By
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,

Petitioner,

VS.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Requested Documents
Concerning Petitioner's
Parole Revocation

[Filed, Apr 9 1970, R. E. Longstaff, *Clerk*, U.S. District
Court Southern District of Iowa]

COMES NOW the respondent, Lou V. Brewer, Warden,
Iowa State Penitentiary, Fort Madison, Iowa, by his at-
torneys and hereby files the requested papers and/or docu-
ments pertaining to petitioner's parole revocation as re-
quested by this court in its order dated March 25, 1970.

Respectfully submitted,

RICHARD C. TURNER

Attorney General of Iowa

By Michael J. Laughlin

MICHAEL J. LAUGHLIN

Assistant Attorney General

Attorneys for Respondent

STATE OF IOWA
DEPARTMENT OF SOCIAL SERVICES
BUREAU OF ADULT CORRECTION SERVICES

REPORT OF VIOLATION

[Filed, Jan 30 1969, Des Moines, Iowa, R. W. Bolzin,
Secretary]

DATE: January 28, 1969

NAME: Morrissey, John J. INST. & NUMBER: FM# 29739

ADDRESS: 710 5th Ave. S. E. Cedar Rapids, Iowa

SENTENCE: 7 years c.c.

OFFENSE(s): False Checks, Larceny, Desertion.

DATE OF SENTENCE: January 5, 1967

UNEXPIRED TIME: 2 years and 2 months

DATE OF PAROLE (PROBATION): June 20, 1968.

I. Rules Violated

#2 I will find a rooming place, which place will be approved by my parole agent on his first visit.

I will immediately report any change of rooming place to the Chief Parole Officer, which shall be subject to approval by the parole agent on his next visit.

#6 I will in all respects conduct myself honestly, avoid questionable associates, obey the law, keep reasonable hours and shall avoid all places of questionable reputation and taverns. I will consult my parole agent before incurring indebtedness.

#9 I will neither own nor operate an airplane, automobile, truck, motorcycle or motorscooter without the written consent of the Chief Parole Officer.

II. I recommend that John J. Morrissey's parole be revoked.

III. Summary of above Violations

#2 Prior to John J. Morrissey's release from the Mental Health Institute at Independence, Iowa Alcoholic Unit. I sent a letter to that institution

instructing them that he could be released to come to Cedar Rapids, Iowa and that he was to obtain a rooming place first and then contact me immediately with his address. He was released on January 10, 1969 and brought to Cedar Rapids by one of the parties who work at Independence. Between January 10, and January 24, 1969 He made no effort to contact me and give me his address or tell me that he was in Cedar Rapids, Iowa. I learned that he had a room at 710 5th Ave. S.E. from him in the Linn county jail where he was being held on a parole violation, which I had a pickup placed with the Cedar Rapids, Iowa Police for. Reasons will be explained in following paragraphs.

III.

Summary of Violations:

- #6. At about 4:15 P.M. January 18, 1969 John J. Morrissey was driving a 1960 white over blue Chevrolet 57-26627 (68) at 3rd Ave. and 6th St. S.E. Cedar Rapids, Iowa and backed into the left front fender of Squad Car #2 Official City B-10034 driven by Officer Serbousek doing about \$53.50 damage to the car. Upon checking the ownership of the Chev. the Police learned that the car had been sold by the Ed. Naughton Auto Sales on January 18, 1969 to a person who said that he was Michael Joseph Connor of 619 I Ave. N.E. Cedar Rapids, Iowa. The police attempted to locate this Connor at that address and learned that people by the name of Countryman lived there. Also at the scene of the accident John gave the police his address as 204 1st St. N.W. Cedar Rapids, Iowa. Upon checking this address later. The police found that this is a vacant apartment. He also informed them that he was insured by Iowa National Mutual Co. with liability insurance. Upon checking with that insurance Co. the police found that they carried neither John Morrissey or Michael Joseph Connor's insurance.

The Captain of Traffic, Captain Overman, then called me on January 21, 1969 with the above information. I told him I did not know where

John was living, in fact I had not been informed that he was in town. I told the Capt. to put a pickup out on John and Place a parole hold on him for me.

I next called the Weyerhauser Co. where Morrissey was supposed to be employed. They informed me that he did work one day and that was January 13, 1969 and had not reported into work since and they had not received a phone call from him. They had no address on him.

Later I received a phone call from a Sam Becker, who owns and operates the Becker Furniture Co. He said that in November of 1968 a man came to his store and said that his name was D. Leo Morrissey of 223 2nd Ave. S.W. Cedar Rapids, Iowa. That he worked for the Post Office. He wanted to buy a bedroom set on credit. Mr. Becker checked the credit guide and learned that a D. Leo Morrissey did work for the post office and had an A-1 credit rating. So he sold this party a bedroom set for \$250.00. This party picked up the bedroom set on November 29, 1968. He was with another man who drove a pickup truck. That is the last they saw this Mr. Morrissey. He wanted to know if I knew the Morrissey that lived at 223 2nd Ave. S.W. the landlady had informed him that this man was on parole. I informed him that that man was John J. Morrissey.

#9 Mr. Morrissey did not have written permission to own or operate an automobile. He was informed that as long as we were aware that he was still using alcohol we would not give him permission to operate a car.

III. Parolee's Version of the Offenses.

He could give no explanation as to why he failed to contact me. He claimed to have been sick from January 13, 1969 to January 18, 1969 and that was the reason he did not go to work. He said that Dr. Barthel told him he did not have to call in to his employer to inform him he was sick. Just when he was released from the doc-

tor's care he would give him a note about his illness for the employer.

He admitted that he bought the 1960 Chev. from Ed Naughton and registered it in Michael J. Connor's name. He also admitted he did not know a Michael J. Connor. He also admitted being the driver of this same Chev. when it backed into the Squad Car.

He further admitted that he bought the furniture at the Becker Furniture store under the name of D. Leo Morrissey and that he signed an agreement in that name. He now does not remember where the bedroom set is. Claimed that he did not remember picking up the set and thought it was still in the store. When informed that Mr. Becker told me he picked the set up on November 29, 1968. He said he did not know where it was.

IV.

Previous Violations

When released from Fort Madison, John was sent to ARP at Independence, Iowa. Upon his release he was taken to the Weyerhaeuser Co. where he obtained employment. This was about the first of August 1968. He worked there until the last week in November and then failed to show up to work. He started to drink vodka and was located on December 1, 1968 in a cemetery on highway #150 near the Midway. He was barefooted and had no hat or coat on. He was incoherent and of course near shock because it was snowing at that time. He was taken to Mercy Hospital by a Deputy Sheriff who found him and then to Independence MHL being committed by the Mental Health Commission in Linn County.

His only other violation was operating a motor-vehicle which I found necessary to remind him he did not have written permission to do.

V.

Parole History

His previous parole history is mentioned above. He had asked permission to marry Betty Chase with whom he was going. Then he got drunk

and went back to the ARP. Vocational Rehab had him enrolled in Area 10 but he only went one week.

VI.

Conclusion:

Because of his continual violating of his parole rules I feel that he should be returned to Fort Madison.

VII.

John is currently in the Linn County Jail on a Parole Violation.

c.c. Board Members

Mr. Linnenkamp

File

Sincerely

/s/ Harold L. Cervený

HAROLD L. CERVENY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner,

vs.

Civil No. 3-869-D
Order

LOU V. BREWER, Warden,
Respondent.

[Filed, Apr. 15, 1970, R: E. Longstaff, *Clerk*, U.S. District
Court Southern District of Iowa]

This matter is before the Court on the petition of John J. Morrissey, hereinafter referred to as petitioner, for a writ of habeas corpus. Petitioner is currently an inmate of the Iowa State Penitentiary at Fort Madison, Iowa.

It appears from papers now on file with the Court that petitioner was originally sentenced to seven years confinement in the Iowa State Penitentiary by the Iowa District Court for Linn County on his plea of guilty to a charge of false drawing and uttering of checks in violation of Iowa Code § 713.3 (1962). Subsequent to his incarceration, petitioner was paroled from the institution. Thereafter, on January 31, 1969, he was arrested for parole violation and returned to the penitentiary. Thereupon, petitioner's original discharge date of August 6, 1970 was replaced on the prison records with a new discharge date of January 20, 1971.

Petitioner complains (1) of his arrest and return to prison without necessary judicial safeguards, (2) of the charge in the date of his discharge without adequate authority therefor, and (3) because he was never prosecuted for a felony as provided by Iowa Code § 247.28.

Consideration is first given to petitioner's allegations relative to his arrest and return to prison without hearing or appointment of counsel.

Under the Iowa Law, one returned to imprisonment as a parole violator is not entitled to a hearing or other judicial review of the actions of the State Parole Board in

revoking his parole. See *Curtis v. Bennett*, 256 Iowa 1164; 131 N.W.2d 1. The Iowa Law has been held sufficient for Federal Constitutional purposes. *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965). The case of *Mempa v. Rhay*, 389 U.S. 128 (1967) decided by the United States Supreme Court applies to situations involving a deferred sentence and does not apply under the facts presented here. See *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968); *Rose v. Haskins*, 389 F.2d 91 (6th Cir. 1968). Petitioner's complaint in this regard is without merit.

Next, consideration is given to petitioner's allegation that he has never been prosecuted for a felony, as provided by Iowa Code § 247.28. It suffices to say for these purposes that this Court knows of no Federal Constitutional standard that would require a state to prosecute a parole-violator as such simply because statutory provisions allow the same.

Lastly, the Court reaches petitioner's allegations concerning the change of his discharge date on the prison records.

The Court notes from the records of the Lee County Iowa District Court, copies of which have been furnished by counsel for respondent, that this issue has not been squarely put before the Iowa Courts for their consideration. Under such circumstances, this Court will not consider the matter. Petitioner must exhaust his state remedies. See 28 U.S.C. 2254.

ORDER

IT IS ORDERED that the petition of John J. Morrissey for a writ of habeas corpus, filed September 12, 1969, be and is hereby denied.

Dated this 15th day of April, 1970.

Roy L. Stephenson
Chief Judge

4-15-70 Copy mailed to Petitioner &
Attorney General.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,

Appellant,

vs.

LOU V. BREWER, Warden,

Respondent.

Notice of Appeal to
Eight Circuit Court
of Appeals

[Filed April 21, 1970, R. E. Longstaff Clerk, U. S. District
Court Southern District of Iowa]

Comes now, the appellant, without assistance of counsel, and wishes to serve notice of appeal of an Order entered on the 15th day of April, 1970 in the United States District Court, Southern District, Davenport Division by the Honorable Judge Roy L. Stephenson in an habeas corpus action number 3-869-D.

The appellant sets forth the following parts of the above named judgement as the point in his appeal;

Page two (2) of an order issued by the Honorable Judge Stephenson, starting at line seventeen (17) to line twenty-two (22) inclusive.

As close as the appellant can tell this action should come under rule Twenty-two (22) of the rules of Civil Procedure for the above named Court.

Appellant would at this time request the Court for permission to proceed in this action in forma pauperis. Appellant would also request of the Court at this time to appoint counsel for the purpose of futhering this action.

With all due respect to the Court the appellant can't seem to agree with the Courts holding that there is no Federal Constitutional standard that would require a State to prosecute a felony charge after the State has deprived the person of his liberty because of that charge. To me the Constitution of the United States surely provides for exoneratíon at law. It would seem to me that when a person is deprived of his liberty without any provision to exonerate

himself that it is in direct conflict with the Constitutional Standards of Equal Protection of the laws. Just because a person is a parole violator does not exempt him from any of the protections of the Constitution. For the above mentioned reasons the appellant wishes to appeal the Order issued by the Court on 4-15-70, to the Eight Circuit Court of Appeals.

Respectfully submitted on this date
4-17-1970

/s/ John J. Morrissey 29739

Appellant

Box 316—Fort Madison, Ia.

Subscribed and sworn to before me this date, April the
seventeenth, 1970

Wm. F. Abel

My commission expires July 4, 1972.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY, #29739,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
ORDER

[Filed, April 21, 1970, R. E. Longstaff, *Clerk*, U. S. District
Court Southern District of Iowa]

This matter is before the Court on the application of John J. Morrissey for permission to appeal this Court's Order of April 15, 1970 in forma pauperis. The application is treated as an application for a certificate of probable cause pursuant to 28 U.S.C. § 2253.

The Court is of the opinion that any appeal from the determination of the issues herein is frivolous and futile. IT IS ORDERED that the application of John J. Morrissey for the issuance of a certificate of probable cause to appeal be and is hereby denied.

Dated this 21st day of April, 1970.

Roy L. Stephens
Chief Judge

4-21-70 Copy mailed to Petitioner &
Attorney General.

UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

No. 20328

JOHN J. MORRISSEY, #29739,
Appellant;

vs.

LOU V. BRÉWER, Warden,
Appellee.

Appeal from the United
States District Court
for the Southern Dis-
trict of Iowa.

[Filed June 4, 1970, R. E. Longstaff, Clerk, U. S. District
Court, Southern District of Iowa]

This cause comes before the Court on consideration of an application for certificate of probable cause. In connection with the application the Court has examined the original files of the United States District Court for the Southern District of Iowa in case No. 3-869-D Civil. Being fully advised in the premises it is now here ordered that the application for certificate of probable cause be, and it is hereby, granted. The Clerk of this Court is directed to regularly docket this appeal.

It is further ordered that Mr. W. Don Brittin of the Des Moines, Iowa Bar be, and he is hereby, appointed to represent appellant on this appeal. Appointed counsel for appellant may have forty days from today's date in which to serve and file five clearly legible typewritten copies of brief of appellant. One additional such copy of appellant's brief should be served on the Attorney General for the State of Iowa. Typewritten briefs are to be on letter-sized paper and fastened in the left margin.

June 3, 1970

6-4-70: Copy to Judge Stephenson
Copy to Attys Turner & Laughlin
Copy to Don Brittin

No. 3-897-D Civil

G. DONALD BOOHER, #29509
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES
AND THE STATE OF IOWA,
ET AL,

Respondents.

20425

Davenport Division
Memorandum
Of Papers Filed, and Date
of Filing

Date

1. March 11, 1970 Petition for Writ of Habeas Corpus.
2. March 11, 1970 Notice of Transfer from a Pretermitted Division.
3. March 17, 1970 Order to Show Cause.
4. March 20, 1970 Motion for an Enlargement of Time.
5. March 20, 1970 Affidavit of Service.
6. March 23, 1970 Order granting to April 7, 1970 to make return.
7. April 7, 1970 Return.
8. April 7, 1970 Memorandum in Support of Return.
9. April 7, 1970 Affidavit of Service.
10. April 13, 1970 Answer by Petitioner.
11. May 1, 1970 Order directing counsel for respondent to file records.
12. May 7, 1970 Certificate of Readiness, Application for Writ of Habeas Corpus and Order dated 2-26-70.
13. May 7, 1970 Certificate—Petition filed 11-21-69 and Order dated 11-26-69. Application filed 12-22-69 Notice of Trover and Order dated 1-6-70.
14. May 28, 1970 Memorandum & Order directing counsel for respondents to file within 10 days, various papers which are the subject of this memorandum & order.
15. June 2, 1970 Letter with copies of records per order of 5-27-70.

16. June 10, 1970. Order denying Petition for Writ of Habeas Corpus.
17. June 16, 1970. Application for Certificate of Probable Cause.
18. June 16, 1970. Order Denying Application for Certificate of Probable Cause.
19. July 28, 1970. Copy of Order from CCA granting ptmr's. application for certificate of probable cause and appointing W. Don Brittin to represent ptmr. consolidating appeal with John J. Morrissey v. Brewer.
20. April 22, 1971. Judgment affirming Order of District Court, by CCA. (attested copy)
21. April 22, 1971. Attested copy of Opinion, CCA, affirming Order of District Court.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

Case No. 2-478-E
(To be supplied by
the Clerk of the
District Court)

G. DONALD BOOHER, No. 29509
Full name and prison number
(if any) of Petitioner
PRO SE

vs.

LEE AND O'BRIEN COUNTIES
AND THE STATE OF IOWA, ET AL.
Name of Respondents

Title 18 U.S.C. Sections
241-242

Title 28 U.S.C. Sections
2241-2254

DEPRIVED OF
EQUAL
PROTECTION OF
STATE-FEDERAL
LAWS IN THE
STATE AND
FEDERAL
CONSTITUTIONS
BY A GENERAL
WARRANT.

[Filed March 11, 1970, R. E. Longstaff *Clerk*, U.S. District
Court Southern District of Iowa]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PERSONS IN STATE CUSTODY

IOWA STAT. 247. 12 (Parole Time not counted), STOPS
AND STARTS, REVERSES, CRIMINAL PENALTIES
OF PUNISHMENT OF THE SENTENCING COURTS.
IOWA STAT. 247. 9 (Legal custody of paroled prisoners).

STRIPS PERSONS ON PAROLE FROM ALL OF THE PENITENTIARIES IN IOWA, OF ALL OF THEIR VESTED CIVIL AND CONSTITUTIONAL RIGHTS OUTLINED IN AND GUARANTEED THEM IN THE LAWS OF THE STATE AND FEDERAL CONSTITUTIONS, SOLEY BECAUSE, IOWA PAROLE LAWS ALLOWS STATE APPOINTED OFFICIALS TO USE PAROLE CONTRACTS SIGNED BY PRISONERS BEFORE THEY ARE RELEASED ON PAROLE AS, GENERAL WARRANTS: WHICH DO UNLAWFULLY DEPRIVE ALL PAROLEES OF A HEARING AND THE DEFENSE OF LEGAL COUNSEL, AT ALL TIMES A STATE PRISONER IS ON PAROLE IN OR OUT OF THE STATE IOWA.

“FORBIDS GENERAL WARRANTS FOR ARREST”
FOURTH AMENDMENT CONSTITUTIONAL PROVISION, WEST V. CAMBEL, 153 U.S. 78:

WILLIAMS V. STEELE, 194 F.2d 32 (8th Cir. 1952) the court said, “the function of habeas corpus is not to correct a practise, but only to ascertain whether the procedure complained of has resulted in an unlawful detention,” BOWEN V. JOHNSTON, 306 U.S. 19, 24 (1959). Pertinently the Federal Habeas Corpus Statute Applies To Prisoners “in custody in violation of the Constitution or of a Law or Treaty of The United States. . . .” Title 28 U.S.C. Section 2241 (Supp. III 1950). Judge Learned Hand would, in addition, permit the writ “whenever else resort to it is necessary to prevent a complete miscarriage of justice.”

Congress may pass laws “necessary and proper” to carry out legislative functions vested in it by Article I. U.S. CONST. art. I Section 8 cl. 18. The power to investigate is a necessary concomitant of its legislative function. McGrain v. Daugherty, 273 U.S. 135 (1927). When Congress in the legitimate exercise of its powers enacts “the supreme law of the land”, state courts are bound by such law even though it effects their rules of practice. U.S. Const. art. VI cl. 2, as construed in Adams v. Maryland, 347 U.S. 179 (1949).

Sanford, Evidentiary Privileges Against The Product of Data Within The Control of Executive Departments, 3 VAND. L. REV. 73, 77 (1949) and Comment, an Informers Tale: Its Use in Judicial and Administrative Proceedings, 63 Yale L.J. 206, 212-13 (1953). The Sixth Amendment guarantees the accused's right to be confronted with the witnesses against him and reserves to him the right of cross-examination. Moreover, the Fifth Amendment restricts the national government from depriving any person of his due process rights while the Fourteenth Amendment protects any person from state interference with these rights.

And Therefore-above-said mandate is interfered with by Iowa Stat. 247.9 and Stat. 247.12: as outlined on page one aforesaid.

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to ascertain that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, the original and two copies shall be mailed to the Clerk of the District Court for the Southern District of Iowa, at Des Moines, Iowa.

If petitioner desires to have a filed copy returned to him, he shall request an additional set of forms and submit same with the original and required two copies.

1. Place of detention. Iowa Penitentiary, Fort Madison, Iowa
2. Name and location of court which imposed sentence. Iowa District Court at Primghar, Iowa
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) # 1564
 - (b) Forgery
 - (c) Iowa Stat. 718.1
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 29th day of April, A.D. 1966
 - (b) A term not to exceed TEN years
 - (c) under Iowa Stat. 718.1.
5. Check whether a finding of guilty was made
 - (a) after a plea of guilty Yes
 - (b) after a plea of not guilty
 - (c) after a plea of nolo contendere
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
 - (a) a jury
 - (b) a judge without a jury Yes
7. Did you appeal from the judgment of conviction or the imposition of sentence? No
8. If you answered "yes" to (7), list
 - (a) the name of each court to which you appealed:
 - i.
 - ii.
 - iii.
 - (b) the result in each such court to which you appealed:
 - i.
 - ii.
 - iii.
 - (c) the date of each such result:
 - i.
 - ii.
 - iii.
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i.
 - ii.
 - iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) I am a poor person and cannot afford counsel,
- (b) and didn't have the money with which to obtain a copy of the proceedings of the court action upon the record nor a transcript of the trial court's proceedings.

(c)

10. Prior to this Petition have you filed with respect to this conviction:

- (a) any petitions in State or Federal Courts for habeas corpus? **STATE COURTS YES**
- (b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? **NO**
- (c) any other petitions, motions or applications in this or any other court? **YES STATE COURTS**

11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. Petition for writ of habeas corpus
 - Petition for writ of habeas corpus (two)
 - ii. Refiled no docket number no hearing
 - Petition for writ of equity sent back
 - iii. Petition for writ of mandamus and injunction
 - Petition for writ of mandamus
 - iv. Notice of default
 - ~~Motion to vacate judgment~~
- (b) the name and location of the court in which each was filed:
 - i. Lee County District Court, Fort Madison, Ia.
 - Lee County District Court, Fort Madison, Ia.
 - ii. Lee County District Court, Fort Madison, Ia.
 - Lee County District Court, Fort Madison, Ia.
 - iii. Supreme Court of Iowa, Des Moines, Iowa
 - O'Brien County District Court, Primghar, Ia.
 - iv. O'Brien County District Court, Primghar, Ia.
 - O'Brien County District Court, Primghar, Ia.
- (c) the disposition thereof:
 - i. Denied, after being deprived counsel
 - Denied, after being deprived counsel twice.
 - ii. Refiled no docket number no hearing
 - Never docketed nor heard, as equity

- iii. Filed no docket number sent back no hearing
Never docketed no docket number
- iv. No docket number no hearing
Denied

(d) the date of each such disposition:

- i. 25th day of February, A.D. 1970
21st day of November, A.D. 1969: 1/6/70;
- ii. 9th day of Jan. 1970.
16th day of Dec. 1969.
- iii. Filed the 12th day of Jan. 1970, sent back no #.
No hearing. Filed 23rd day of Jan. 1970
- iv. 16th day of Feb. 1970.
30th day of Dec. 1969.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. Denied without hearing 2/26/70
Denied without hearing 11/26/69.
- ii. Denied no hearing 1/6/70.
Denied no hearing " " "
- iii. No opinion no hearing
No opinion no hearing
- iv. No opinion no hearing
1/7/70 denied.

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) False arrest-False Imprisonment until parole was revoked, after illegal search without no process.
in. O'Brien County, Iowa. Parole revocation is based upon Collusion-Iowa-Stat. 610.15-Stat. 666.5; and Stat. 704.3-Stat. 740.6, and the conspiracy of the O'Brien County Sheriff's Dept; onto the Lee County District Court, Fort Madison, Iowa (1969).
- (b) Sentence to imprisonment is fraudulently based upon ex post facto operation of Iowa Stat. 718.1.
- (c) Should the above-named Honorable Court cause its Subpeona of Duces Tecum to be issued directing that O'Brien County District Court and Lee County District Court, at Primghar, Iowa and Fort Madison, Iowa Case No. 15451—Lee County; and Case No. 1564—O'Brien County District Court clerks turn over all their case records Petitions, Affidavits, Motions, filed under said case numbers, as proof and evidence in good faith; herein.

13. State concisely and in the same order the facts which support each of the grounds set out in (12):

(a) unlawful search, false arrest and false imprisonment and held incommunicado in O'Brien County Jail until parole was revoked under total censorship of all civil and constitutional rights.

(b) Par. 5. is the only clause that can charge a crime or criminal offense in the text Iowa Stat. 718.1, the State of Iowa ex post facto uses the entire nine degrees of different testimony of several newer and different criminal offenses as one continuous crime all at the same time without notice as one Charge of Forgery, and thus, sentences the same as one crime under one penalty of punishment.

(c) The case records, Petitions, Affidavits, Motions, shall prove that the Petitioner-herein, was falsely arrested and falsely imprisoned while on parole, and held in the said-O'Brien county jail without probable cause under total-incommunicado for several days, deprived of sending in his parole report, thus, in order to get his parole revoked, by the O'Brien county Attorney and Sheriff not allowing the Petitioner no civil right, until after the State of Iowa Parole Board Ordered said parole revoked.

14. Has any ground set forth in (12) been previously presented to this or any other court, (state) or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. Supreme Court of Iowa

(a) (b) Lee County District Court

ii. (a) O'Brien County District Court

iii. (a) The Governor of the State of Iowa

(b) the proceedings in which each ground was raised:

i. (a) all of the actions set-out in (11) above.

ii. (b) The Habeas Corpus dated 2/25/70, filed on the 25th, denied without a hearing on 2/26/70

iii. under a four-dollars filing fee. A copy is affixed hereto.

16. If any ground set forth in (12) has not previously been presented to any court, state or federal, set forth the

ground and state concisely the reasons why such ground has not previously been presented:

- (a)
- (b)
- (c)

17. Were you represented by an attorney at any time during the course of

- (a) your arraignment and plea? Court Appointed Yes
- (b) your trial, if any? same as above
- (c) your sentencing? same as above
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Court would appoint an attorney for an appeal.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

18. If you answered "yes" to one or more parts of (17), list

- (a) the name and address of each attorney who represented you:
 - i. H. H. Schultz, Primghar, Iowa.
 - ii.
 - iii.
- (b) the proceedings at which each such attorney represented you:
 - i. Trial Court Proceedings Only.
 - ii.
 - iii.

I understand that a false statement or answer to any of the questions contained in this pleading will subject me to penalties for perjury.

/s/ George Donald Booker
Signature of Petitioner

SUBSCRIBED and SWORN to
before me this 10th day of
March, 1970.

/s/ Wm. F. Abel
Notary Public
My commission expires
July 4, 1972

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

G. DONALD BOOHER, # 29509
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al,*
Respondents.

Civil No. 2-478-E
Notice of Transfer
of This Cause
from a
Pretermitted Division

[Filed, March 11, 1970, R. E. Longstaff, *Clerk*; U.S. District
Court, Southern District of Iowa]

* * *

Pursuant to the provisions of subsisting Order of Pre-
termmission and Rule No. 2, Local Rules of the United States
District Court, Southern District of Iowa, this cause is
transferred from the Eastern Division to the Davenport
Division of this District, and is now docketed and identified
under Civil Number 3-897-D.

Henceforth, all documents presented to the Court and
all record entries made by the Court in this cause shall bear
in the caption the Civil Number last above written.

Dated this 11th day of March, 1970.

/s/ R. E. Longstaff
R. E. LONGSTAFF
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

G. DONALD BOOHER, # 29509,
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al.,*
Respondents.

Civil No. 3-897-D
Order to Show Cause

[Filed, March 17, 1970, R. E. Longstaff, *Clerk*, U.S. District
Court, Southern District of Iowa]

This matter is before the court upon the Petition for
Writ of Habeas Corpus, filed on March 11, 1970, and the
court having examined said Petition and being duly advised
in the premises, it appears that the respondent, Lou V.
Brewer, Warden, Iowa State Penitentiary, Fort Madison,
Iowa, has custody of the Petitioner.

IT IS THEREFORE ORDERED

1. Lou V. Brewer, Warden, Iowa State Penitentiary, re-
spondent, is ordered and directed to show cause why a
Writ of Habeas Corpus should not be granted, and said
respondent shall make return certifying the true cause of
the detention of Petitioner within three days after service
of this Order upon him.
2. The Clerk of the United States District Court,
Southern District of Iowa, shall forthwith serve this Order
upon the respondent by certified mail.

DATED: March 17, 1970.

/s/ Roy L. Stephenson
ROY L. STEPHENSON
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER,

Petitioner,

vs.

Civil No. 3-897-D
Return

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al.*,

Respondents.

[Filed, April 7, 1970, R. E. Longstaff, *Clerk*, U.S. District
Court, Southern District of Iowa]

COMES NOW, the respondent, Lou V. Brewer, Warden,
Iowa State Penitentiary, Fort Madison, Iowa, by his at-
torneys and makes Return to the Order to Show Cause
issued herein as follows:

1. That the petitioner, G. Donald Booher, is presently
detained under authority of a mittimus issued from the
District Court of Iowa, O'Brien County. On April 15, 1966,
petitioner plead guilty to the crime of Forgery in violation
of Section 718.1, Code of Iowa 1962; was paroled on No-
vember 14, 1968; and recommitted to the Iowa State Peni-
tentiary, Fort Madison, Iowa, on or about September 24,
1969, subsequent to revocation of parole as provided by
Section 247.9, Code of Iowa 1966.

2. That the petition for writ of habeas corpus filed herein
is insufficient and a writ of habeas corpus should not issue
for the reasons set forth in the Memorandum in Support
attached hereto.

RICHARD C. TURNER

Attorney General of Iowa

By James W. Hughes

JAMES W. HUGHES

Assistant Attorney General

ATTORNEYS FOR RESPONDENTS

CERTIFICATION

It is hereby certified by the undersigned that the cause of detention of the petitioner set forth in Paragraph 1 of the appended Return is true and correct:

RICHARD C. TURNER
Attorney General of Iowa

By James W. Hughes
JAMES W. HUGHES
Assistant Attorney General
State House, Des Moines, Iowa

ATTORNEYS FOR RESPONDENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOCHER,

Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al.,*

Respondents.

Civil No. 3-897-D
Memorandum in
Support of Return

[Filed, April 7, 1970, R. E. Longstaff, *Clerk*, U.S. District
Court, Southern District of Iowa]

STATEMENT OF THE CASE

On April 15, 1966, the petitioner entered a plea of guilty in the District Court of Iowa, O'Brien County, to the charge of Forgery in violation of Section 718.1, Code of Iowa 1962. Petitioner was sentenced to a term not to exceed ten (10) years in the Iowa State Penitentiary, Fort Madison, Iowa, on April 29, 1966, and mittimus issued. The petitioner failed to appeal the O'Brien County District Court's final judgment to the Supreme Court of Iowa. On November 14, 1968, the petitioner was granted a parole. Petitioner was recommitted to the Iowa State Penitentiary on September 24, 1969, subsequent to revocation of said parole. Petitioner's application for a writ of habeas corpus filed in the District Court of Iowa, Lee County, on November 21, 1969, was denied on November 26, 1969. Petitioner's application for a writ of habeas corpus filed in the District Court of Lee County, Iowa, on February 25, 1970, was denied on February 26, 1970. The records of the Iowa Supreme Court indicate that petitioner failed to appeal to the Iowa Supreme Court the denial of those applications by the Lee County District Court. Several spurious documents which the petitioner denotes as Writ of Equity, Writ of Mandamus, Writ of Mandamus and Injunction, Notice of Default, and Motion to Vacate Judgment were summarily dismissed by the courts to which they were addressed ostensibly for the reason that they were and are nonexistent or inappropriate remedies.

ARGUMENT

Petitioner's petition should be denied for the reason that he fails to join the proper respondent, to wit: Lou V. Brewer, Warden, Iowa State Penitentiary, in whose lawful custody petitioner is detained. Furthermore, petitioner has failed to affirmatively show that he has unsuccessfully exhausted state remedies, a condition precedent to application for a writ of habeas corpus in federal court.

Petitioner alleges that immediately before revocation of his parole he was the victim of unlawful search, false arrest, and false imprisonment. These activities, if they did occur, are irrelevant and immaterial to the legality of petitioner's detention for the reason that they don't relate to the administrative revocation of petitioner's parole. Petitioner fails to aver any irregularity in the administrative revocation of parole as provided by Section 247.9, Code of Iowa 1966 or any misapplication of that Section by the Board of Parole.

Petitioner does attack the legality of his detention by asserting that he was denied due process of law for the reason that said revocation of parole was without a hearing and not subject to judicial review. There is no merit in petitioner's contention that he was denied due process concerning the revocation of his parole. An individual recommended to prison subsequent to administrative revocation of parole is not entitled to a hearing or a judicial review of the actions of the State Parole Board in revoking the petitioner's parole.

In the leading case of *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1, the Iowa Supreme Court stated the applicable law in this type of situation (256 Iowa at 1167):

"Iowa is among the majority of states which have consistently held that under statutes relating to revocation of probation or suspension of sentence which contain no express provision for notice and hearing, such a revocation without notice and hearing does not constitute a denial of 'due process.'"

In *State v. Rath*, 258 Iowa 568, 139 N.W.2d 468, and *Cole v. Holliday*, — Iowa —, 171 N.W.2d 603, the Iowa Supreme Court again examined and reaffirmed its previous decisions to the effect that a parolee has no rights in connection with the revocation of his parole or probation.

The Federal Courts have also been in agreement with the Iowa rule and have held that a parolee has no constitutional right to notice and a hearing on the question of revoking his probation or parole. See *Rose v. Haskins*, 388 F.2d 91; *Curtis v. Bennett*, 351 F.2d 931; *Hutchinson v. Patterson*, 267 F. Supp. 433; *United States v. Hartsell*, 277 F. Supp. 933.

CONCLUSION

For all the above reasons, respondent respectfully submits that the petition for writ of habeas corpus should be denied.

Respectfully submitted,
 RICHARD C. TURNER
Attorney General of Iowa

By James W. Hughes,
 JAMES W. HUGHES
Assistant Attorney General

ATTORNEYS FOR RESPONDENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER,

Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al.*

Respondents.

Civil No. 3-897-D.

Answer

[Filed, April 13, 1970, R. E. Longstaff, Clerk, U.S. District
Court, Southern District of Iowa]

COMES NOW, The Petitioner, in his answer to the respondents attorney, and says that their MEMORANDUM IN SUPPORT OF RETURN is no more than a SHAM-REPLY for lack of the truth of the manner in which State Courts of Record Of Iowa, REFUSE and DENY THE FEDERAL WRIT OF HABEAS CORPUS WITHOUT AN EVIDENTIARY HEARING AS WELL AS THE PETITIONER'S RIGHT TO BE REPRESENTED BY COUNSEL WHEN THE PRISONER IS INDIGENT AND CANNOT AFFORD TO HIRE COUNSEL.

Petitioner Filed his application for the Writ of Habeas Corpus IN THE UNITED STATES DISTRICT COURT WITH AN AFFIDAVIT REQUESTING THE ASSISTANCE OF COUNSEL. THE COURT GAVE THE RESPONDENT'S ATTORNEY AND EXTENSION OF TIME WITHOUT THE PETITIONER BEING APPOINTED COUNSEL IN ORDER THAT THE PETITIONER COULD OBJECT, TO THE EXTENSION OF TIME AND MAKE THE RESPONDENT'S ATTORNEY SHOW LEGAL CAUSE, WHY THE RESPONDENT'S ATTORNEY OBJECTS TO THE APPLICATION FOR THE WRIT UNDER (TITLE 18 U.S.C. SECTION 242 (1948)) which allows prisoners to bring an action against any person who willfully under color of state law, deprives him of his constitutional rights. While in such an action the prisoner need not first exhaust his state remedies, CHAPTER 740 STATUTE 3 OPPRESSION IN OFFI-

CIAL CAPACITY. If any judge, or other officer, by color of his office, willfully and maliciously oppress any person under pretense of acting in his official capacity, he shall be fined not exceeding one thousand dollars, and imprisoned in the county jail not more than one year, and be liable to the injured party for any damage sustained by him in consequence thereof. Of Iowa (1962-1966) thus, clears the way for the Writ to be had under a full and complete EVIDENTIARY HEARING on its merits—and injunctive relief is in order because of the deprivation of the function of the COMMON-LAW within the statutes of Iowa.

STATE OF IOWA }
COUNTY OF LEE } ss:

G. DONALD BOOHER
Petitioner

Subscribed and sworn to before me on the 10th day of April, A.D. 1970, Wm. F. ABEL, Notary Public. My commission expires on the 4th day of July 1972: IN THE IOWA STATE PENITENTIARY, P.O. BOX 316, FORT MADISON, IOWA 52627

2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER,

Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al.,*

Respondents.

Civil No. 3-897-D
Order

[Filed, May 1, 1970, R. E. Longstaff, *Clerk*, U.S. District
Court, Southern District of Iowa]

This matter is before the Court on the petition of G. Donald Booher for a writ of habeas corpus.

It is evident from papers now on file with the Court in this case that petitioner has filed several actions relating to his detention in the Courts of the State of Iowa. The information on file relating to these various actions is not sufficient for this Court's purposes.

IT IS ORDERED that counsel for respondent file, within ten days of the date of this order, copies of all pleadings, transcripts of record and other papers associated with the various actions brought by this petitioner in the Courts of the State of Iowa in connection with his present detention.

Dated this 30th day of April, 1970:

ROY L. STEPHENSON
Chief Judge

5-1-70 Copy mailed to Petitioner & Attorney General.

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR LEE COUNTY AT FORT MADISON

GEORGE DONALD BOOHER,

Plaintiff,

vs.

STATE OF IOWA,

LOU V. BREWER, Warden,

Iowa State Penitentiary,

Defendant.

No. 15370

Order

[Filed, Nov. 26, 1969, 4:33 PM. District Court, Lee County,
Iowa Lyle B. Miller, Clerk]

This matter comes before the Court upon a petition for writ of habeas corpus filed November 21st, 1969.

The Court has examined the petition and it appears to the Court that the principal complaint is that the petitioner had a parole revoked without a hearing. The Court finds that there is no requirement in Iowa that a hearing be held to revoke a parole.

IT IS THEREFORE HEREBY ORDERED That the petition for writ of habeas corpus is denied.

Dated this 26th day of November, A.D., 1969.

s/ Illegible

Judge of District Court
First Judicial District

IN THE DISTRICT COURT OF THE STATE OF IOWA,
IN AND FOR LEE COUNTY, AT FORT MADISON

GEORGE DONALD BOOHER,
Plaintiff,

vs

Civil Case No. 15370
Order

STATE OF IOWA,
LOU V. BREWER, Warden
Iowa State Penitentiary
Fort Madison, Iowa

Respondents.

The plaintiff filed a petition for writ of habeas corpus on November 21st, 1969, which was denied on November 26th, 1969 without hearing. The petitioner has filed an additional petition for habeas corpus alleging no grounds that did not exist on the 21st day of November, 1969.

First, habeas corpus cannot be brought piecemeal. See: *Simonton vs. Huiskamp*, 256 Iowa 279. Secondly, if the plaintiff was dissatisfied with the Court's ruling of November 26th, 1969, his remedy is by appeal and not by additional habeas corpus petition.

The plaintiff's present petition is therefore denied.

Dated this 6th day of January, A.D., 1970.

J. R. LEARY
Judge of District Court
First Judicial District

IN THE DISTRICT COURT OF THE STATE OF IOWA,
IN AND FOR LEE COUNTY, AT FORT MADISON

G. DONALD BOOHER,

Petitioner,

vs

THE STATE OF IOWA,

Respondent.

No. 15451
Order

[Filed Feb. 26, 1970, 3:22 PM, District Court, Lee County,
Iowa, Lyle B. Miller, *Clerk*]

This is the third time the petitioner has made application to this Court. The first time was on November 21, 1969, which petition for Writ of Habeas Corpus was denied by this Court. The second time was on December 22, 1969, which application was denied by this Court on the 6th day of January, 1970.

The first application was denied because petitioner was complaining about not having a hearing for parole violation. Since no hearing is required, the petition was denied. The second petition was denied because habeas corpus cannot be brought piece meal. With reference to the present petition, it is difficult to know exactly what the petitioner is complaining about; but in any event, the ground of his complaint existed at the time that his original petition was presented to this Court and should have been presented at that time. This petition is also denied because habeas corpus cannot be brought piece meal.

Dated and signed this 26th day of February, A.D., 1970.

/s/ J. R. LEARY

Judge of District Court
First Judicial District

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, #29509
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al.*,
Respondents.

Civil No. 3-897-D
Memorandum and
Order

[Filed, May 28, 1970, R. E. Longstaff, *Clerk*, U.S. District
Court, Southern District of Iowa]

This matter is before the Court on the petition of G. Donald Booher for a writ of habeas corpus.

On April 30, 1970, this Court entered an order requesting that counsel for respondents file copies of various papers in connection with the case. On May 7, 1970, counsel for respondents filed said papers, as requested. However, the Court notes that papers relating to petitioner's parole and the subsequent revocation thereof are not included in the record as it now stands.

The Court requests that counsel for respondents file genuine copies of all existing papers related to the revocation of parole giving rise to this litigation, including a copy of the parole agreement under which petitioner was released on parole.

IT IS ORDERED that counsel for respondents be and are hereby directed to file, within ten days of the date of this order, the various papers which are the subject of this memorandum and order.

Dated this 27th day of May, 1970.

5-28-70 copies mailed to Petitioner & Atty. General.

Roy L. Stephenson
ROY L. STEPHENSON, *Chief Judge*
U. S. District Court
Southern District of Iowa.

PAROLE AGREEMENT

I, No.
in consideration of being placed on parole by the Board of
Parole of the State of Iowa, do hereby agree that I will lead
an honorable life and that I will obey the laws of the State
of Iowa, and that I will abide by the rules and regulations
that the Board of Parole and the Director, Adult Correction
Services prescribe and that I will faithfully and honestly,
to the best of my ability, follow and carry out the following
terms and conditions during the term of my parole, to-wit:

1. I will proceed at once to the place of employment with
.....
2. As soon as possible after reaching my destination, I
will report to
..... show him my parole and at
once enter upon the employment provided for me. I shall
also report by mail my arrival at destination. I will find a
rooming place, which place shall be approved by the agent
of the Bureau of Adult Correction Services on his first visit.
I will immediately report any change of rooming place to
the Chief Parole Officer which shall be subject to approval
of the parole agent on his next visit.
3. I will remain in such employment and under such
supervision unless I have the written consent of the Chief
Parole Officer to change therefrom. I agree to keep myself
gainfully employed during my parole period.
4. I will not go beyond the territorial limits of.....

WITHOUT THE WRITTEN CONSENT OF THE Chief
Parole Officer.

5. I will on the first week of each month until my final dis-
charge, forward by mail to the Chief Parole Officer, Bureau
of Adult Correction Services, State House, Des Moines,
Iowa, a true report of my activities as required, and said
report will be signed by my employer and/or supervisor.
6. I will in all respects conduct my self honestly, avoid
questionable associates, obey the law, keep reasonable hours
and shall avoid all places of questionable reputation, and
taverns. I will consult my parole agent before incurring
indebtedness.
7. (a) I will agree to completely abstain from the use of
beer or intoxicating liquor and drugs.

(b) I will refrain from the excessive use of intoxicating liquor or beer.

(c) I will agree to attend an AA Meeting at least once a week.

8. I will not marry without written consent of the Chief Parole Officer.

9. I will neither own nor operate an airplane, automobile, truck, motorcycle or motor scooter without the written consent of the Chief Parole Officer.

10. I will not carry, own, possess, or use a firearm or weapon of any kind while on parole.

11. I further agree not to open or use a checking account with any bank while on parole without the written consent of the Chief Parole Officer.

12. Until I receive my final discharge, I understand that I am in the custody of the Warden of the and under the control of the Bureau of Adult Correction Services and I further understand and agree that I am subject to be taken into custody and returned to the for any reason that shall be determined sufficient to the Board of Parole.

13. I further expressly agree and consent that should I leave the State of Iowa and should be arrested in another state that I do hereby waive extradition to the State of Iowa from any state where I may be found and also agree that I will not contest any effort by any jurisdiction to return me to the State of Iowa.

14. I understand and agree that this agreement shall be in full force and effect until I receive my final discharge.

I have carefully read and do clearly understand the provisions and conditions of my parole and I do hereby agree to abide by the rules and regulations of said parole as herein above set forth and I do hereby accept all of said terms and conditions of my said parole.

Dated this day of 19.....

INMATE

WITNESSES

I understand that should I violate my parole by leaving my prescribed territory and am apprehended outside the state of Iowa as a fugitive that upon return I will be subject to criminal prosecution in accordance with Section 745.3 of the 1962 Code of Iowa which provides for an additional sentence of not to exceed five years to commence after the expiration of my previous sentence.

.....
SIGNATURE

Witness

CP-37263

No.
Name
Reg. No.
Date of Parole

WARDEN'S RETURN

TO THE BOARD OF PAROLE

Sirs: ...

This Parole came into my hands

and by virtue thereof and subject to the conditions therein imposed, I permitted the within named

to go outside the enclosure of this institution _____, at the hours of _____ M. this _____ day of _____

Warden

MEMO

From Kenneth D. Brown

To John W. Walton

SUBJECT Booher, George Donald FM 29509

DATE: Sept. 3, 1969

In reference to the difficulty experienced by Mr. Booher while in this area, He lost three jobs before he was transferred. The first was at Modern Welding, where he lost his temper because the minister who was helping him out wouldn't let him use his car. At this point he quit. Second job he was fired from the Murray Iron Works in Burlington for allegedly asking a fellow employee to go outside with him and having in his hand at the time a length of pipe. He lost the Third job on a farm at Morning Sun because his boss said that he made him nervous.

Also, this agent took a 357 Magnum revolver from him even though this was supposed to be his wife's gun. This was done because it was in the house with Donald.

It should also be noted that The agent for the BCI in this area suspected Mr. Booher of attempting to rustle cattle.

cc. Mr. Struck
Mr. Linnenkamp
Mr. Stevens

[Received Sep 4, 1969]

STATE OF IOWA
DEPARTMENT OF SOCIAL SERVICES
INTEROFFICE MEMORANDUM

Sept. 16, 1969

To: C. G. Stevens, Parole Agent

From: John Walton, Chief Parole and Probation
Supervisor

Subject: George Donald Booher, FM #29509

Based on your Report of Violation dated 9-8-69, the Board of Parole revoked the parole of this subject on 9-13-69. If this subject is indicated by your report to be available for immediate return to the appropriate institution, arrangements for such return will be completed as soon as possible.

If local charges are now pending, please maintain such contacts as are necessary to be advised of developments and of the final disposition of such charges, advising this office immediately.

If delay is met in prosecution, please advise whether or not the local authorities are willing for subject to be immediately returned to the institution and later returned for disposition of local charges.

cc. Supervisor

File

Warrants to;
Warden Brewer.
Subject is in
O'Brien County Jail
ready for return.

J. W.

STATE OF IOWA
DEPARTMENT OF SOCIAL SERVICES
BUREAU OF ADULT CORRECTION SERVICES

REPORT OF VIOLATION

DATE: September 8, 1969

NAME: George Donald Booher

INST. & NUMBER: FM # 29509

ADDRESS: Box 239 Sutherland, Iowa

SENTENCE: 10 years Iowa State Penitentiary: Fort
Madison, Iowa

OFFENSE(s): Forgery

DATE OF SENTENCE: 4/29/66

UNEXPIRED TIME: 2 years-4 months

DATE OF PAROLE (PROBATION): November 14, 1968

RULES VIOLATED:

#3. I will remain in such employment and under such supervision unless I have written consent of the Chief Parole Officer to change therefrom, I agree to keep myself gainfully employed during my parole period.

#4. I will not go beyond the territorial limits of O'Brien County without the written consent of the Chief Parole Officer.

#9. I will neither own nor operate an airplane, automobile, truck, motorcycle, or motor scooter without the written consent of the Chief Parole Officer.

RECOMMENDATION:

I would recommend that the parole of the above named man be revoked.

SUMMARY OF ABOVE VIOLATIONS:

#3. Agent Brown's reports shows that subject left two places of employment because of his temper.

#4. Subject was told that he could not go out of O'Brien County unless he had a travel permit.

#9. Subject was told that he was to have a valid driver's license and also show that he had insurance on his car before

a permit would be issued for him to own or operate a motor vehicle. Subject told me that he had lost his driver's license. So he was told to get another license. However I learned that his license was under suspension.

PREVIOUS PAROLE HISTORY:

The above named man was paroled to Agent Brown at Mount Pleasant, Iowa on November 14, 1968. Subject lost his first two places of employment due to his temper. In July Agent Brown transferred subject into to my territory, which was Sutherland, Iowa. On July 14, 1969 I made contact with subject at Sutherland, Iowa. I had to wait for him to come home, when he came he was driving his car. I noted in his file that he had never been given permission to operate a car. So I asked to see his driver's license. He told me that he had lost them and that he would have to get another one. I told him that he was not to drive any more until such time he could show me a valid license. I also asked to see his Insurance on the car but he stated that he could not find it. The car was licensed to his wife, and she also stated that she could not find the insurance policy nor her husband's driver's license. I told the both of them that I would have to have proof of the Insurance and the driver's license or we could not issue any permit for subject to drive.

When I returned to the office I called Mr. John W. Walton to check on subject's story about the driver's license and also I noted in the file that he (Subject) had requested that he be transferred to the State of Minnesota. Mr. Walton told me that Minnesota had turned down subject's request for transfer, and that he would check at the driver's license bureau and see if subject did have a valid license.

I received a letter written to subject by John W. Walton on July 22, 1969, that he had checked with the driver's license bureau and found that subject's license was under suspension. Mr. Walton in his letter explained to subject that he would have to send in an SR-22 form to get his license back.

Due to the fact that I was going on vacation I wrote subject a letter and told him that Minnesota had rejected his request for transfer and that he would have to get employment here in Iowa.

When I first made contact with subject we talked about employment. He stated that he had not as yet found employment due to the fact he could not find work that would pay him what he wanted. I asked him what kind of employment he wanted and what kind of salary he thought he should have. He stated that he was a welder and that he should have a least \$3.00 or \$4.00 per hr. I told him that I could get him employment in Sioux City, but that he would have to start out at \$2.25 per Hr., or perhaps at not more than \$2.75 per hr. He stated that he would not work for this kind of money.

When I returned from my vacation I went to Sutherland, Iowa on August 20, 1969 to see subject. His father-in-law stated that subject had left their home and they did not know where he was, he stated that subject's wife had gone to Iowa City to the hospital to have a new baby. They stated that he had been gone for about two weeks. I put out a local pick up on subject O'Brien County. The sheriff of O'Brien County picked subject up. On September 3, 1969 I went to the O'Brien County sheriff's Office and I talked to subject. I asked him where he had been and he stated that he had been in Dakota City, Nebraska working for the Iowa Beef Packers until they went on strike. I told him I had a report that he was seen down by Mount Pleasant, Iowa and he stated that he had been. Also I had a report that subject was talked to by the Deputy sheriff of Plymouth County due to the fact subject was selling a lot of tools. I asked him where he got the tools and he stated that they were his. The O'Brien County sheriff stated in the presence of subject that subject had bought gas in Sutherland at a gas station and had drove off and not paid for it, and the sheriff took him back to Sutherland and subject paid for the gas, so no charges were filed. Subject also admitted that he continued to drive his car.

I learned that subject had gotten another driver's license but that it was no good as he had put down the wrong social security number and also had signed his name George Donald Booker, and used the address R R #2 Cherokee, Iowa.

I asked subject why he had done all of these things knowing that it was wrong and he stated that he knew he had done wrong but that when he learned Minnesota had turned

him down and that his wife was in the hospital he just went out and done what he was doing.

It is my feeling that this young man will never make a parole until he has different outlook on life than he has now. He feels that everyone is working against him and that he is worth much more on employment than he is paid. He has a very strong feeling about his ability as a welder and will not take anything he can get until such time he can prove to an employer that he is worth more money.

PRESENT STATUS OF SUBJECT:

Subject is now confined in the O'Brien County Jail at Primghar, Iowa. There are no Court Actions pending against subject at this time;

SIGNED C. G. Stevens

C. G. STEVENS, *Agent*

Bureau of Adult Correction Services

[Received, Sep 9 1969]

STATE OF IOWA
THE BOARD OF PAROLE
DES MOINES

DATE August 29, 1969

HOLD FOR

IOWA BOARD OF PAROLE

To: GEORGE SLEEPER
Sheriff: O'Brien County, Iowa
Primghar, Iowa

Subject: GEORGE DONALD BOOHER

Institution: Fort Madison (Penitentiary) Parolee X

Kindly hold in safekeeping, while awaiting disposition by this Department, the above named subject who is under our supervision, having been sentenced to the institution indicated above.

Very truly yours,
R. W. BOBZIN, *Secretary*
Iowa Board of Parole and
Administrator Interstate Compact

By C. G. Stevens
C. G. STEVENS
Parole Agent

Copy-Agent
File
Sheriff
O'Brien County

The above named man is in the O'Brien County Jail. Was arrested on August 28, 1969 by sheriff George Sleeper.

I am going to submit a violation report to the Iowa Board of Parole, with recommendation to revoke subject's parole.

C. G. Stevens
Agent

[Received, Sep 2, 1969]

IOWA BOARD OF PAROLE

DES MOINES

STATE OF IOWA, }

County of Polk, }

ss. :

KNOW ALL MEN BY THESE PRESENTS;

That George Donald Booher, #29509-FM was on the 29th day of April 1966, convicted in the District Court of O'Brien County and State of Iowa, of the crime of forgery and was sent to the Iowa State Penitentiary at Fort Madison, Iowa; that said George Donald Booher was admitted to said Iowa State Penitentiary on the 3rd day of May, 1966, that in accordance with the provisions of Chapter 192, of the Acts of the Thirty-second General Assembly of Iowa, approved April 2, 1907, and the rules adopted by the Board of Parole, said George Donald Booher was on the 14th day of November, 1968, paroled by said Board of Parole, to go outside of the buildings and enclosure of said Iowa State Penitentiary, upon the conditions stipulated in a certain parole agreement, executed in duplicate, and signed by said parolee.

AND WHEREAS it has come to the knowledge of the Board of Parole that said George Donald Booher has violated the conditions of said parole agreement and has thereby forfeited his right to remain longer on parole, therefore, it is hereby ordered by said Board that said George Donald Booher be forthwith arrested and returned to said Iowa State Penitentiary to serve as much of the remainder of his sentence as said Board shall hereafter determine.

It is further ordered that Warden's Authorized Officer, or any Sheriff or Peace Officer of the State of Iowa be and he is hereby authorized and directed to arrest said George Donald Booher whenever and wherever found, and return him to the said Iowa State Penitentiary.

WITNESS the Board of Parole of the State of Iowa by its Chairman and Secretary, at Des Moines, this 13th day of September, A.D. 1969.

John E. Andrews
Chairman.

Certified by R. W. Bobzin

Secretary.

**IOWA DEPARTMENT OF PUBLIC SAFETY
DRIVERS LICENSE DIVISION**

File A 156915

Date February 21, 1969

Cert. No. 48517

G. DONALD BOOHER
2704 Washington
Burlington, Iowa

OFFICIAL NOTICE

YOU ARE HEREBY NOTIFIED THAT:

Effective March 21, 1969 your privileges to operate motor vehicles are suspended under the provisions of Section 321.210 Par 7, Code of Iowa, (Serious violation), until June 10, 1969.

You are ordered to send or deliver all your licenses or permits to operate motor vehicles to: Highway Patrol Dist. 13, City Hall, Mt. Pleasant, Iowa.

**FAILURE TO DO SO WILL RESULT IN
PROSECUTION AGAINST YOU**

OFFICIAL NOTICE

The below notice Does apply to you:

Effective June 10, 1969 your privileges to operate motor vehicles will Remain Suspended in accordance with the provisions of Section 321A.17 (1) (2), Code of Iowa, until such time as you post proof of financial responsibility.

Effective March 21, 1969 your privileges to register and have motor vehicle registrations and plates for vehicles owned in whole or in part by you are suspended under the provisions of Section 321A.17 (1) (2) until such time as you post proof of financial responsibility with the department.

You are hereby ordered to send or deliver all of your registration certificates, plates and licenses to operate motor vehicles to: Dist. 13.

**FAILURE TO DO SO WILL RESULT IN
PROSECUTION AGAINST YOU**

WARNING: YOU ARE NOT ENTITLED TO OPERATE ANY MOTOR VEHICLES IN THIS STATE UNTIL YOU HAVE MET THE NECESSARY REQUIREMENTS AND RECEIVED AN OFFICIAL NOTICE FROM THIS DEPARTMENT, TER

Distribution:
 Subject
 File Copy
 Patrol Division
 Sheriff
 Chief of Police Des Moines

A156915

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered

☒ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

| | |
|----------------|--|
| REGISTERED NO. | SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in) |
| CERTIFIED NO. | Donald Booher |
| INSURED NO. | SIGNATURE OF ADDRESSEE'S AGENT, IF ANY |
| DATE DELIVERED | SHOW WHERE DELIVERED (only if requested) |
| Feb 24, 1969 | |

D.O.B. 09/17-38
 lic. 3821560 68-70
 Soc. Sec. 477-42-4557
 SJK

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, #29509
Petitioner,

vs.

Civil No. 3-897-D.
Order

LEE AND O'BRIEN COUNTIES
AND THE STATE OF IOWA, *et al.*,
Respondents.

[Filed Jun 10, 1970, R. E. Longstaff, Clerk, U.S. District
Court, Southern District of Iowa]

This matter is before the Court on the petition of G. Donald Booher for a writ of habeas corpus. Booher, currently an inmate of the Iowa State Penitentiary at Fort Madison, Iowa, will be referred to herein as petitioner.

Petitioner's complaint is vexatious. It is difficult to know exactly what is being alleged. Nevertheless, the Court has caused counsel for the respondent to file various papers so that an extensive review of the circumstances relating to petitioner's present confinement might be had.

It appears that petitioner is complaining, at least in part, because he was arrested and returned to prison on a parole revocation without a hearing on other judicial review.

Consideration is first given to petitioner's allegations relative to his arrest and return to prison without hearing or appointment of counsel.

Under the Iowa Law, one returned to imprisonment as a parole violator is not entitled to a hearing or other judicial review of the actions of the State Parole Board in revoking his parole. See *Curtis v. Bennett*, 256 Iowa 1164; 131 N.W.2d 1. The Iowa Law has been held sufficient for Federal Constitutional purposes. *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965). The case of *Mempa v. Rhay*, 389 U.S. 128 (1967) decided by the United States Supreme Court applies to situations involving a deferred sentence

and does not apply under the facts presented here. See *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968); *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968). Petitioner's complaint in this regard is without merit.

The Court has carefully examined the remainder of the petition in this case. No complaint is evident therein that would be cause for the issuance of this Court's writ. The relief requested by petitioner will be denied.

IT IS ORDERED that the petition for a writ of habeas corpus filed March 11, 1970 by G. Donald Booher be and is hereby denied.

Dated this 10th day of June, 1970.

Roy L. Stephenson
Chief Judge

210-70 Copy mailed to Petitioner & Attorney General.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, # 29509.
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES
AND THE STATE OF IOWA, *et al.*,
Respondents.

ss. Civil No. 3-897-D

Certificate of
Probable Cause

[Filed, June 16, 1970, R. E. Longstaff, *Clerk*, U.S. District
Court, Southern District of Iowa]

Petitioner, asks that the Court issue its writ of probable cause and order appeal of his writ to the eight circuit court of Appeals at St. Louis, Missouri, on the ground that the Petition seeks it's only relief on "The State of Iowa, unlawfully does use a General Warrant without due process of law" in all parole violation cases which is forbidden in all such cases by the federal statutes.

Petitioner, filed his Writ under the United States Civil rights act Title 18 U.S.C. 241-242 of the U.S. Federal Code, and was denied a return filed copy of the same, this requisite is not an act of due process of law, but an act of all State of Iowa Judges that hide behind Chapter 4 Statute 2 of the (1962) code of Ia.

Petitioner, therefore asks this court for its certificate of probable cause, and movant to the higher Court within (7) days. Dated this 15th day of June, A.D., 1970:

STATE OF IOWA }
COUNTY OF LEE } ss:

Respectfully Submitted By
G. Donald Booher
G. DONALD BOOHER, No. 29509
Box 316
Iowa State Penitentiary
Fort Madison, Iowa 52627

Sworn and subscribed to before me Wm. F. Abel, a notary public at the penitentiary at Fort Madison, for the State of Iowa on the 15th day of June, A.D., 1970.

My commission expires on the 4th day of July, A.D., 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, #29509

Petitioner,

VS.

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al.*,

Respondents.

Civil No. 3-897-D
Order

[Filed Jun. 16, 1970, R. E. Longstaff, Clerk, U. S. District Court Southern District of Iowa]

This matter is before the Court on the application of G. Donald Booher for a certificate of probable cause to appeal.

On March 11, 1970, Booher, hereinafter called petitioner, filed a vexatious complaint with this Court. The complaint, while referring to 18 U.S.C. §§ 241-242, is, in reality, a petition for a writ of habeas corpus. Recognizing that petitioner was proceeding pro se, the Court ignored all technical procedural requirements and directed the Iowa Attorney General to respond.

Various papers have been filed, at this Court's request, relating to petitioner's present state of confinement and to his attempts, on the state level, to extract himself therefrom.

After giving all the matters before the Court careful and deliberate consideration, the Court, on June 10, 1970, entered an order denying petitioner the relief requested. From that order application is now made for a certificate of probable cause to appeal.

As related in the order of June 10, 1970, the only complaint evident in the petition filed herein relates to the revocation of petitioner's parole without the benefit of his having a hearing or appointment of counsel. As stated in said order, the law in this regard is well settled. See *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965).

Any appeal from the Court's order herein would be frivolous and without merit. Under such circumstances,

the application for a certificate of probable cause should be denied.

ORDER

IT IS ORDERED that the application for a certificate of probable cause to appeal filed June 16, 1970 by G. Donald Booher be and is hereby denied.

Dated this 16th day of June, 1970.

Roy L. Stephenson
Chief Judge

6-17-70 copy mailed to Petitioner,
Attorney General.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20425

G. DONALD BOOHER, #29509,
Appellant,

vs.

LEE AND O'BRIEN COUNTIES AND
THE STATE OF IOWA, *et al.*,
Appellees.

Appeal from the
United States Dis-
trict Court for the
Southern District
of Iowa.

Filed July 28, 1970, R. E. Longstaff, Clerk, U. S. District
Court Southern District of Iowa]

This cause comes before the Court on consideration of an application for certificate of probable cause. In connection with the application Court has examined the original files of the United States District Court for the Southern District of Iowa in this case being No. 3-897-D Civil. Being fully advised in the premises it is now here ordered that the application for certificate of probable cause be, and it is hereby, granted. The Clerk of this Court is directed to regularly docket this appeal and to consolidate this appeal with Cause No. 20328, *John J. Morrissey v. Lou V. Brewer*, Warden, heretofore docketed June 3, 1970.

It is ordered that Mr. W. Don Brittin of the Des Moines, Iowa Bar be, and he is hereby, appointed to represent appellants on these consolidated appeals. It is further ordered that appointed counsel prepare a joint brief in this cause and No. 20328. Notwithstanding this Court's order entered in Cause No. 20328, appointed counsel may have forty days from today's date in which to serve and file five clearly legible typewritten copies of the joint brief of appellants in said consolidated appeals. One additional copy of said brief should be served on the Attorney General for the State of Iowa. Typewritten briefs are to be on letter-sized paper and fastened in the left margin.

July 23, 1970

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 20,328.

John J. Morrissey,

Appellant,

v.

Lou V. Brewer, Warden,

Appellee.

No. 20,425.

G. Donald Booher,

Appellant,

v.

Lee and O'Brien Counties and the
State of Iowa, et al.,

Appellees.

Appeals from the
United States Dis-
trict Court for the
Southern District
of Iowa.

[April 21, 1971.]

Before MATTHES, Chief Judge, VAN OOSTERHOUT, MEHAFFY,
GIBSON, LAY, HEANEY and BRIGHT, Circuit Judges,
EN BANC.

MATTHES, Chief Judge.

These consolidated appeals are from orders entered in two separate cases in the United States District Court for the Southern District of Iowa denying appellants' petitions for writs of habeas corpus.

Appellant John J. Morrissey was convicted in January of 1967 in the District Court of Iowa, Linn County, upon his plea of guilty to the charge of false drawing or uttering of checks in violation of Iowa Code §713.3 (1966), and was sentenced to a term of imprisonment not to exceed 7 years. After serving a part of this sentence in the Iowa State Penitentiary, Morrissey was paroled from the institution on June 20, 1968. On January 24, 1969, he was arrested as a parole violator, and on January 31, 1969, after review of the parole officer's report, the Iowa Board of Parole entered an order revoking his parole, whereupon he was returned to the Iowa State Penitentiary.¹

Appellant G. Donald Booher was convicted in April of 1966 in the District Court of Iowa, O'Brien County, upon his plea of guilty to the charge of forgery in violation of Iowa Code §718.1 (1962), and was sentenced to a term of imprisonment not to exceed 10 years. Having served a portion of this sentence in the Iowa State Penitentiary, Booher was granted a parole on November 14, 1968. In August of 1969, however, Booher was arrested for violation of his parole. On September 13, 1969, on the basis of a report of violations filed by Booher's parole officer, the Iowa Board of Parole revoked his parole, and he was recommitted to the Iowa State Penitentiary to complete service of his sentence.²

¹ The Iowa Board of Parole revoked appellant Morrissey's parole on the basis of a report submitted January 28, 1969 by the parole agent charged with his supervision. The report set forth numerous violations of the conditions of Morrissey's parole including, *inter alia*, purchase of an automobile under an assumed name and unauthorized operation of this vehicle, purchase of furniture by use of an assumed name in order to obtain credit, and several violations of the employment conditions of his parole agreement.

² On September 8, 1969 the parole officer charged with the supervision of appellant Booher filed a report with the Iowa Board of Parole which charged that Booher, in violation of specific conditions of his parole, had left the territorial limits of O'Brien County, Iowa, without the consent of his parole officer, had obtained an Iowa driver's license by use of an assumed name after suspension of his own license for a serious traffic violation, and had

After unsuccessfully pursuing state remedies,³ each appellant, in separately filed actions, petitioned the federal district court for a writ of habeas corpus alleging that his constitutional rights had been violated because he did not receive a hearing upon revocation of his parole. Morrissey's petition was denied by order entered April 15, 1970, Booher's by order of June 16, 1970. The district court denied applications for certificates of probable cause to appeal in each case. Subsequently, our court granted certificates of probable cause, appointed counsel, and ordered that the appeals be consolidated and submitted to the court en banc.

The sole issue presented for review is whether appellants' constitutional rights to due process were violated when the Iowa Board of Parole revoked their paroles without a hearing. Appellants contend that the Due Process Clause of the Fourteenth Amendment requires that a hearing be held prior to the revocation of parole, that at such hearing they be given the opportunity to confront and cross-examine witnesses and to present evidence on their own behalf.

Consideration of the issue raised by appellants requires an understanding of the Iowa procedure for the granting and revocation of paroles. By statute, Iowa Code §247.1 et seq., Iowa has created an independent three member board of parole which is appointed by the governor with the approval of the senate. Not more than two members

unlawfully operated a motor vehicle using this falsely obtained license. The report also set forth a number of violations relating to the employment conditions of his parole agreement.

³ Appellant Morrissey petitioned the District Court, Lee County, Iowa, alleging that he should have been granted a hearing relative to his parole violation. This was denied on June 26, 1969. Subsequently, he filed a petition for writ of habeas corpus in the Supreme Court of Iowa, which was dismissed on the grounds that the petition was not made to the court or judge most convenient to him; that the legality of his confinement had been adjudicated by the Lee County District Court's ruling; and, that if he was entitled to any relief the proper remedy was by way of appeal from the denial of his habeas petition. Morrissey filed a notice of appeal from this denial to the Iowa Supreme Court, which was dismissed by that court on September 12, 1969 because not timely filed.

Appellant Booher filed a petition for writ of habeas corpus in the District Court of Lee County, Iowa, alleging that his constitutional rights were violated because he had not been granted a hearing relative to his parole revo-

may belong to the same political party, and at least one member must be a practicing attorney. For administrative purposes, the board is a part of the department of social services. The legislature has conferred upon the board the power to grant paroles to convicted persons committed to the state penitentiary or reformatory and to establish rules and conditions under which paroles may be granted. Once an inmate is placed on parole, he is under the supervision of the director of the division of corrections of the department of social services, but while on parole, he remains in the legal custody of the warden or superintendent and under the control of the chief parole officer. Section 247.9 of the Iowa Code provides that all paroled prisoners are subject, at any time, to be taken into custody and returned to the institution from which they were paroled. Parole agents charged with the supervision of paroled persons may not revoke a parole, but may recommend that the board of parole take this action.

The Iowa statutes neither prohibit nor expressly pro-

tection. This petition was denied on November 26, 1969. Booher subsequently filed two other petitions with the Lee County District Court which were summarily denied. He also filed a number of other documents with the Iowa courts variously denominated as writs of equity, mandamus, injunction, notice of default and motion to vacate judgment, all of which were summarily dismissed by the courts to which they were addressed. Booher did not appeal to the Iowa Supreme Court from any of these denials. However, he was advised by letter of the County Attorney of O'Brien County, Iowa, that the Iowa Supreme Court had repeatedly taken the position that a parolee was not entitled to a hearing on parole revocation.

For purposes of exhaustion of state remedies it would have been more orderly had appellants properly perfected appeals to the Iowa Supreme Court from the denial of relief in the lower state courts. However, in view of the consistent position taken by the Iowa Supreme Court in holding that there is no constitutional right to a hearing in revocation proceedings (*Cole v. Holliday*, 171 N.W.2d 603 (Iowa 1969); *State v. Rath*, 258 Iowa 568, 139 N.W.2d 468 (1966); *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), cert. denied, 380 U.S. 958 (1965); *Pagano v. Bechly*, 211 Iowa 1294, 232 N.W. 798 (1930)), as discussed *infra*, it appears that an appeal on this issue to the Iowa Supreme Court would be futile. In *Cole v. Holliday*, *supra* at 606, that court stated that it would adhere to its position unless the United States Supreme Court preempted this area of the law. Moreover, appellees do not contend that appellants should have made any further attempts to exhaust state remedies.

vide for notice and hearing before revocation of parole.⁴ In *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), cert. denied, 380 U.S. 958 (1965) one of the questions presented to the Iowa Supreme Court was whether the Iowa statutes should be interpreted as requiring that a hearing be afforded prior to revocation of parole. In addressing itself to this issue, the court held:

"The Iowa statutes do not provide for such a hearing before the parole board. The board is given no power to issue subpoenas nor swear witnesses. There is nothing in the statutes which expressly or by implication requires the board to enter findings of fact of the kind made by judicial bodies. The absence of such provisions shows the legislature did not intend that the board should conduct any such hearings. In other words, the Iowa statutes contemplate that the board of parole shall be guided by the information which shall become available to it through its own investigation procedures. It is thus an administrative function rather than judicial. When the board grants a prisoner a parole, it does so as a matter of grace and not as a duty. It has the right to impose such conditions as it feels proper and, when the prisoner accepts the parole, he does so subject to its terms and conditions. He cannot later in a judicial hearing complain as to their fairness or propriety."

Id. at 3-4.

In *Curtis v. Bennett*, the Iowa court also held that a parolee had no constitutional right to notice and hearing before the board could revoke his parole. In so holding, the court reaffirmed the position taken in its earlier decision in *Pagano v. Bechly*, 211 Iowa 1294, 232 N.W. 798 (1930), that parole is a matter of grace on the part of the

⁴ Some states, by express statutory provision, require notice and hearing prior to revocation of parole. Other states by statute expressly dispense with the necessity of notice and hearing before revocation. However, it appears that the majority of states, like Iowa, have neither reserved the right of summary revocation nor required notice and hearing by express legislative enactment. For discussion of the various types of statutes and their judicial interpretation, see 29 A.L.R.2d Anno. 1074.

sovereign and that a defendant acquires no vested rights when granted a parole.⁵

As the district court noted in the orders denying appellants' petitions for habeas corpus, our court has approved the procedure followed by Iowa on revocation of parole. In *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965)⁶ we held:

"The Iowa Court in its opinion sets out the contentions made by the petitioner and holds that all proceedings in connection with petitioner's parole, the revocation thereof and his retaking are in conformity with Iowa law. Petitioner makes the same contentions here. We believe that all of the contentions now urged by petitioner were fairly considered and properly answered by the Iowa Supreme Court.

"A parole is a matter of grace, not a vested right. A large discretion is left to the States as to the manner and terms upon which paroles may be granted and revoked. Federal due process does not require that a parole revocation be predicated upon notice and opportunity to be heard."

Id. at 933.

Appellants, however, urge that we re-examine the position espoused in *Curtis*, and hold that the revocation of

⁵ The Iowa Supreme Court also discussed and gave approval to the other views supporting the holding that there is no constitutional right to notice and hearing upon revocation of parole. These views, set out in the court's opinion in *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1, 3 (1964), cert. denied, 380 U.S. 958 (1965) and in 29 A.L.R.2d Anno. 1074, 1077-78 include the theory that conditional liberty after conviction does not free the prisoner from service of his sentence, but merely extends the prison walls so as to allow him to serve his sentence outside the prison but while still in the custody and under the control of the prison authorities. Another theory is that conditional liberty after conviction is in the nature of a contract, the terms of which include a provision for summary revocation. It is reasoned that the convicted person is free to accept or reject the "contract" but that once accepted, the terms are binding upon him. The third view is that the convicted person was afforded full constitutional protection at the trial at which he was convicted. Subsequent to conviction, his status is that of an escaped felon, and the constitutional guarantees given a person accused of crime do not extend to a later enforcement of punishment already validly imposed.

⁶ After being denied relief by the Iowa Supreme Court, petitioner Curtis sought a writ of habeas corpus on the same grounds in the United States District Court for the Southern District of Iowa, which was denied. The matter came before our court on petitioner's application for certificate of probable cause to appeal from that denial.

their paroles without a hearing was violative of the basic requirements of due process.

For support appellants rely almost exclusively upon and adopt the reasoning of the opinion in *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970). In *Hahn*, the Seventh Circuit held that the revocation of probation without a hearing violated the probationer's constitutional right to due process under the Fourteenth Amendment. In so holding, the Court recognized that probation is a privilege and not a right, but found that "essential procedural due process no longer turns on the distinction between a privilege and a right." *Id.* at 103. In reaching this conclusion the Court applied the reasoning of the Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which it was held that termination of public assistance payments to a welfare recipient by the State without affording him a pre-termination evidentiary hearing deprives the recipient of procedural due process in violation of the Fourteenth Amendment. In *Goldberg*, the Supreme Court found that welfare "... benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege and not a right.'" *Id.* at 262. (Footnote omitted). The Supreme Court reasoned that the extent to which procedural due process must be afforded the recipient "depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." *Id.* at 263. The *Hahn* court applied this same balancing test to conclude that the probationer's loss of freedom outweighed the added state burden of granting a hearing prior to revocation of his probation. In its opinion, the Seventh Circuit recognized that the Supreme Court in *Escoe v. Zerbst*, 295 U.S. 490 (1935) had held that there is no constitutional right to a hearing on revocation of probation apart from any statute. However, the *Hahn* court interpreted this statement in *Escoe* as indicating "only that the [Supreme] Court's opinion was not based on a constitutional right to a hearing and not as a binding precedented rejection of such a constitutional right." *Id.* at 105. The court entertained the view that the basis of the *Escoe* statement was the

"privilege-right" distinction and that this has been determined by recent Supreme Court decisions.

With these considerations in mind, we are compelled to examine the test delineated by the Supreme Court in *Goldberg v. Kelly*, supra at 262-63, which led the Seventh Circuit in *Hahn* to conclude that due process required that a hearing be held on revocation of probation. In explaining the analytical process for utilization of this "balancing test," the Supreme Court in *Goldberg* held:

"Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah v. Larche*, 363 U.S. 420, 440, 442 (1960)."

Id. at 263. The "precise nature of the government function" with which we are here concerned is the whole scheme of the granting of paroles to imprisoned convicts, as established by the Iowa statutes.

Parole relates to an administrative action taken after the convict has served a portion of his sentence behind prison walls. It is not a suspension of sentence, but "a substitution during the continuance of the parole, of a lower grade of punishment, by confinement in the legal custody and under the control of the warden within the specified prison bounds outside the prison, for the confinement within the prison adjudged by the court." *Jenkins v. Madigan*, 211 F.2d 904, 906 (7th Cir.), cert. denied, 348 U.S. 842 (1954). The legal procedures providing for parole are a part of the legislative function of creating a penological system which encompasses, of course, rules to govern the care and discipline of inmates. Parole does not end or in any way affect a prisoner's sentence, but is a correctional device authorizing service

⁷ The Supreme Court decisions to which the court referred are *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

of sentence outside the penitentiary. *People ex rel Abner v. Kinney*, 300 Ill.2d 201, 195 N.E.2d 651, 653 (1964).

In *Rose v. Haskins*, 388 F.2d 91 (6th Cir.), cert. denied, 392 U.S. 946 (1968), on facts which closely parallel those before us, the court squarely held that "[a] state prisoner does not have a constitutional right to a hearing on a state parole revocation." *Id.* at 95. The petitioner in *Rose* was an Ohio prisoner whose parole was revoked without a hearing. The Ohio parole statutes, like those of Iowa, contained no provision for hearing on parole revocation, and the Supreme Court of Ohio, like the Supreme Court of Iowa, had held that there was no right to a hearing on revocation of parole. *In re Varner*, 166 Ohio St. 340, 142 N.E.2d 846 (1957). In concluding that the Ohio procedure for revocation of parole deprived the prisoner of no constitutional guarantees to which he was entitled, the court pointed out that the rights which the parolee claimed to be violated apply prior to conviction and not to a prisoner serving a sentence imposed upon a valid judgment. The court further reasoned that under Ohio law a parolee is in a position similar to that of a "trusty." The parolee and the trusty continue to serve their sentences even though they enjoy the privilege of leaving the confines of the prison walls. Both remain in the custody and under the control of the prison authorities. The court stressed that federal courts should be reluctant to interfere with state prison discipline, quoting with approval from *United States v. Sullivan*, 55 F.Supp. 548, 550 (E.D. Ill. 1944):

"In disposing of this contention, we are not called upon to review the record of any judicial proceeding. We are confronted merely with the question of whether the state administrative body, endowed by statute with discretion to determine whether a parole should be granted, may, after having once acted favorably, thereafter revoke the earlier order and deny parole. In the performance of their duties, such administrative officers are called upon to exercise judgment and discretion, to investigate, deliberate and decide. *People v. Joyce*, 246 Ill. 124 and 135, 92 N.E. 607, 20 Ann.Cas. 472. The court's jurisdiction and duties ended when the judgment was entered; thereafter the execution of the sentence was within the sole authority of the executive department of the state. The

manner of executing the sentence and extension or mitigation of punishment are fixed by the legislative department and what it has determined must be put in force and effect by the administrative or executive officers in whom the power is lodged. . . . The administration of the parole law is the exercise, through the administrative department, of the state's power to keep safely, supervise and discipline its prisoners. Such powers are not judicial but are matters of 'prison discipline.'

Rose v. Haskins, supra at 96.

Our court is firmly committed to the principle that prison officials are vested with wide discretion in controlling persons committed to their custody. *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970); *Courtney v. Bishop*, 409 F.2d 1185 (8th Cir.), cert. denied, 396 U.S. 915 (1969); *Douglas v. Sigler*, 386 F.2d 684 (8th Cir. 1967). Unless infringement of a paramount constitutional right is involved, as, for example, in the case of infliction of cruel and unusual punishment (*Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968)), federal courts are loathe to interfere. *Burns v. Swenson*, supra; *Courtney v. Bishop*, supra.

It cannot be disputed that the state has a legitimate interest in deciding whether convicted felons should be granted parole. Broad discretion must be vested in a responsible body to enable it, in each individual case, to balance the need to protect the welfare and security of society with the desirability of placing a convicted person on parole in order to promote his rehabilitation and restoration to a useful life. The function of the parole board in weighing these countervailing factors when determining whether to grant parole was aptly described in *Menechino v. Oswald*, 430 F.2d 403, 407 (2d Cir. 1970):

"It must make the broad determination of whether rehabilitation of the prisoner and the interests of society generally would best be served by permitting him to serve his sentence beyond the confines of prison walls rather than by being continued in physical confinement. In making that determination the Board is not restricted by rules of evidence or procedures developed for the purpose of determining

legal or factual issues. It must consider many factors of a non-legal nature, such as psychiatric reports with respect to the prisoner, his mental and moral attitudes, his vocational education and training, the manner in which he has used his recreation time, his physical and emotional health, his intrapersonal relations with prison staff and other inmates, his habits, and the nature and extent of community resources that will be available to him upon his release, including the environment to which he plans to return."

We are persuaded that the same types of non-legal, non-adversary considerations often prevail in the parole board's determination of whether a prisoner is a "good risk" for remaining outside the prison walls and in its decision to revoke a parole.

Moreover, we think that the function of the prison authorities and the parole board is not unlike that of the Federal Government as proprietor of a military installation, as discussed in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 896 (1961). Both are charged with the management of their own internal affairs, and both have traditionally been allowed broad discretion in the handling of matters within their jurisdictions. In the *Cafeteria & Restaurant Workers Union* case the Supreme Court weighed this proprietary function of the Government with the private interest of an employee who was summarily excluded from the premises of a military installation for failure to meet security requirements, and concluded that the action taken, without a hearing and without advice as to the specific grounds for the exclusion, was not violative of the right to due process. Compare also *Jay v. Boyd*, 351 U.S. 345, 354 (1956).

While we recognize the importance which the individual parolee attaches to being allowed to remain outside the prison walls while serving his sentence, we are not constrained to hold that his interest in obtaining a hearing on revocation of that privilege is sufficient to override the interest of the state and the prison authorities in effectively managing internal disciplinary and custodial affairs. As opposed to the welfare recipient in *Goldberg v. Kelly*, supra, the prisoner has no statutory right, even if "qualified," to be granted conditional liberty or allowed to remain on parole.

Moreover, if boards of parole were required to grant hearings, adversary in nature, with the full panoply of rights accorded in criminal proceedings, their function as an administrative body acting in the role of *parens patriae* would be aborted.⁸ The probable result of the imposition of such stringent requirements upon their method of operation would actually be to decrease the number of paroles granted due to the heavy burden placed upon the administrative processes of supervision and investigation.⁹

⁸ In *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir.), cert. denied, sub nom *Thompson v. United States Board of Parole*, 375 U.S. 957 (1963), the court, sitting en banc, held that procedural due process was not required by the constitution in federal parole revocation proceedings. Judge (now Chief Justice) Burger described the function of a parole board:

"The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. . . . Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of *parens patriae*. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege."

⁹ We do not view our decision as a categorical rejection of the holding in *Hahn v. Burke*, supra, that a probationer has a constitutional right to a hearing before revocation of his probation. The Seventh Circuit in *Hahn*, supra at 105, n.5, specifically noted that it was not faced with the question of the constitutional right to a hearing upon revocation of parole and did not purport to decide that issue. Likewise, we do not pass upon whether there is a constitutional right to a hearing upon revocation of probation.

However, since appellants urge that for purposes of the applicability of procedural due process probation and parole should be treated alike, we deem it appropriate to delineate what we view as significant differences between the two. Probation is the release of the defendant by judgment of the court before sentence has commenced. (Iowa Code § 247.20). It is judicial action taken before the prison door is closed and without the defendant ever being placed under the direct control of the prison authorities. The conditional liberty accorded on probation may be revoked or abrogated only by a subsequent judicial action, which by its normal function is amenable to the granting of notice and hearing. See *McCoy v. Harris*, 108 Utah 407, 160 P.2d 721, 723 (1945). Conversely, as the Iowa court noted in *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1, 3 (1964), cert. denied, 380 U.S. 958 (1965), the parole board is not equipped to conduct hearings. The board has no power to issue subpoenas or swear witnesses, and does not purport to conduct proceedings of a judicial nature.

In holding that a prisoner has no constitutional right to a hearing upon revocation of his parole, we emphasize, however, that the parolee cannot be made the subject of arbitrary action. As noted by the Iowa Supreme Court in *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), cert. denied, 380 U.S. 958 (1965), where the parolee alleges as basis for relief that he is not the party intended, that the revocation is a forgery, or that the officials attempting to revoke are without authority, the legality of his confinement may be inquired into by habeas corpus. *Id.* at 4.

Contending that *Mempa v. Rhay*, 389 U.S. 128 (1967) supports their position that the Due Process Clause of the Fourteenth Amendment requires a hearing on revocation of parole,¹⁰ appellants argue that revocation of parole is a stage in the criminal proceeding. We are not convinced that *Mempa* lends support to appellants' position, nor do we agree with the postulate upon which their contention rests.

In *Mempa v. Rhay*, *supra* at 130, the Supreme Court at the outset of its opinion stated that "these consolidated cases raise the question of the extent of right to counsel at the time of sentencing where the sentencing has been deferred subject to probation." (Emphasis added). The Washington court had granted probation to the defendant upon his conviction, but, pursuant to the provisions of Wash. Rev. Code §§9.95.200, 9.95.210, had deferred actual imposition of sentence. Upon revocation of the defendant's probation, the trial judge imposed sentence. The Supreme Court did not question the authority of the state to defer sentencing and couple that proceeding with revocation of probation, but found that counsel must be afforded at this deferred sentencing stage of the proceeding. In so holding, the Court reiterated the position taken in its earlier right-to-counsel decisions that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Id.* at 134.

The core of *Mempa* is that because sentencing, whenever and however it takes place, is a stage in the criminal pro-

¹⁰ Appellants do not seek relief on the basis of denial of counsel but merely argue that the *Mempa* holding supports their contention of a right to a hearing as a requirement of due process.

ceeding against an accused, the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment requires that the right to counsel be afforded at sentencing.

We cannot agree that revocation of parole is a stage of the criminal proceeding.¹¹

"A criminal action is terminated by the final judgment entered upon a plea or verdict of guilty. *Frad v. Kelly*, 302 U.S. 312, 317, 58 S.Ct. 188, 82 L.Ed. 282. Final judgment means sentence, and sentence means final judgment. *Miller v. Aderhold*, 288 U.S. 206, 210, 53 S.Ct. 325, 77 L.Ed. 702; *Hill v. United States ex rel. Wampler*, 208 U.S. 460, 464, 56 S.Ct. 760, 82 L.Ed. 1283; *Berman v. United States* 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204; . . ."

Phillips v. United States, 212 F.2d 327, 335 (8th Cir. 1954). See also *Richardson v. Markley*, 339 F.2d 967, 969 (7th Cir.), cert. denied, 382 U.S. 851 (1965) and *Hyser v. Reed*, 318 F.2d 225, 238 (D.C. Cir.), cert. denied sub nom *Thompson v. United States Board of Parole*, 375 U.S. 957 (1963), both holding that parole revocation is not a part of the criminal process.

Finally, we are moved to comment, as did the Sixth Circuit in *Rose v. Haskins*, supra, that if changes are to be made in the prison disciplinary system of granting and revoking paroles, such matters should be altered at the legislative and not the judicial level. The legislature, and not the courts, are equipped to not only require changes in the administration of prison and parole management, but to establish the machinery for the effectuation of such procedural alterations.

In our opinion, federal courts should not encroach into areas which have traditionally been matters of state concern. The operation of state penological systems, absent

¹¹Note that in *Allegre v. Turner*, 422 F.2d 214 (10th Cir.), cert. denied, 399 U.S. 916 (1970), the court reiterated its earlier position that *Mempa* is not applicable to parole revocation proceedings which are not a part of the sentencing process. *Id.* at 218. However, in this same case, the court afforded relief to one of the appellants who claimed he had been denied assistance of counsel in the judicial proceedings that had resulted in the revocation of his probation. The court held that this denial was a clear abuse of a federal constitutional right. *Id.* at 220-21.

flagrant violations of constitutional guarantees, are within the domain of state interest. *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968). Intrusions into this area by requiring the states to provide a hearing as a prerequisite to an effective revocation of parole, in all cases, and regardless of the circumstances, obviously would increase the business of already overburdened state and federal courts. Such interference would, in our considered judgment, also serve as a deterrent to the goal of fostering and improving harmonious state-federal relations. It would, in our opinion, be contrary to the basic principle of comity between the federal and state governments. Apropos here is the observation by the Supreme Court that this notion of comity is:

"a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Younger v. Harris, ... U.S. ... (February 23, 1971).

In holding that the Due Process Clause of the Fourteenth Amendment does not require that a hearing be granted on revocation of parole, we note that our decision conforms with those of the various federal courts of appeal which have held that certain procedural safeguards do not extend to parole proceedings as a requirement of constitutional due process. *Allen v. Perini*, 424 F.2d 134 (6th Cir.), cert. denied, 400 U.S. 906 (1970); *Rose v. Haskins*, supra; *Eason v. Dickson*, 390 F.2d 585 (9th Cir.), cert. denied, 392 U.S. 914 (1968); *Williams v. Dambor*, 377 F.2d 505 (9th Cir.); cert. denied, 389 U.S. 866 (1967); *Hyser v. Reed*, supra; *Richardson v. Markley*, supra; *Johnson v. Tinsley*, 234 F.Supp. 866 (D. Colo.), aff'd, 337 F.2d 856 (10th Cir. 1964). Cf. *Douglas v. Sigler*, supra; *Mead v. California Adult Authority*, 415 F.2d 767 (9th Cir. 1969); *Earnest v. Willingham*, 406 F.2d 681 (10th Cir. 1969).

Finally, we recognize that the Supreme Court has on several occasions declined the opportunity to pass upon this issue. As recently as November 9, 1970, certiorari

was denied in *Allen v. Perini*, supra, in which the Sixth Circuit reaffirmed the position taken in *Rose v. Haskins*, supra, which is directly contrary to the contentions which appellants have presented to our court.

For all of the foregoing reasons, the orders of the district court are affirmed.

Our mandate shall issue forthwith.

LAY, Circuit Judge, with whom HEANEY and BRIGHT, Circuit Judges, concur, dissenting:

The Fourteenth Amendment to the Constitution of the United States reads in part "Nor shall any state deprive any person of life, liberty or property, without due process of law." This clause is unambiguous on its face. Its plain meaning requires notice of the charges or an opportunity to be heard before a state may deprive the liberty of any person.

Under Iowa law a parolee may be arrested, without notice of the fact that he will be returned to prison, without notice as to why he is being returned to prison, and without an opportunity to be heard in defense of the charge. The state's hypothesis is that due process is not required in the setting of parole revocation. A literal reading of the Constitution makes this postulate difficult to understand. A parolee is a "person" within the meaning of the due process clause. It is the "state" which revokes the parole status. Therefore, the only words which could possibly exempt the parolee from the operation of the Fourteenth Amendment are "deprive" and "liberty." These are not complex words with ambiguous meanings. It is true that parolee lives in society with more restrictions than other citizens, that his is a "conditional" liberty. However, in a sense every person's liberty is conditional on abiding by the rules of law. To reason that a parolee who is returned to the gray perimeter of prison walls is not "deprived" of "liberty," approaches the realm of judicial sophistry.

Such provincial and stunted rationalizations cannot square with words of the Constitution. Since logic and justice do not mandate the denial of due process to a parolee I am able to assess its denial in only one light. The denial of due process in parole revocation simply

mirrors society's overall attitude of degradation and defilement of a convicted felon.¹ It is said 20th Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison;² it cares even less for his future when he is released from prison.³ He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted⁴ and we react with sickened wonder and disgust when he returns to a life of crime.

¹ Denial of due process in the parole revocation of a parolee falls far short of the ideals expressed in the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83 (1967):

"A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual, no matter how degenerate. It is a radical departure from that tradition to subject a defined class of persons, even criminals, to a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power. . . ."

² Cf. Governor Scott, "The Bar that Improves the 'Bars': A Plea for Prison Reform in North Carolina," *Judicature*, March 1971 p. 220; see also *Holt v. Sarger*, 309 F.Supp. 262 (E.D. Ark. 1970), appeal pending.

³ A recent cover story in *Time Magazine* on the unhappy state of our correctional system pointed out: "Even though two-thirds of all offenders are on parole or probation, they get the least attention: 80% of the U. S. correctional budget goes to jails and prisons . . . Only about 20% of the country's correctors work at rehabilitation . . ." *Time Magazine*, Jan. 18, 1971, "The Shame of the Prisons" p. 53.

⁴ See Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence*, The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States, p. 367 (1969) [hereinafter cited as *Sentencing*]:

"The primary purpose of parole conditions is to maximize the parole officer's control over the parolee's behavior. As a result, parole conditions tend to be numerous and to touch upon many aspects of the parolee's life, some of which are only remotely related to the causes of his criminality. The violation of many of these conditions usually does not indicate a failure of the parolee to adjust to community life or an imminent danger to society, but indicates instead a normal pattern of behavior well within that expected of usually law-abiding persons."

If social values and goals be germane to the legal issue, the state sustains no valid governmental policy in such treatment. The cliché that "society breeds crime" is not irrelevant to the discussion. But the judiciary can only be interested in social values which are compatible within the requirements of the Constitution. And there should be little doubt that the Constitution clearly prohibits the summary imprisonment of any man without due process of law. Justice Harlan recently wrote for the Supreme Court in *Boddie v. Connecticut*; ... U.S. ... (1971):

"Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend,' *Windsor v. McKeigh*, 93 U.S. 274, 277 (1876). See *Baldwin v. Hale*, 1 Wall. 223 (1863); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that 'due process of law signifies a right to be heard in one's defence,' *Hovey v. Elliott*, supra, at 417, has continually recurred in the years since *Baldwin*, *Windsor*, and *Hovey*. Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Id.*, at 313."

The very minimum standard of due process requires notice to the parolee of the reason for the revocation of his parole and an opportunity for him to be heard in resistance of the revocation. Cf. *Townsend v. Burke*, 334 U.S. 736 (1948).⁵ We recently said:

⁵ The minimal requirements of notice of the charge and an opportunity to be heard provide the safeguard to abuse of revocation. Studies have shown that many paroles have been revoked on recommendations of parole officers because of the parolee's alleged involvement in a new crime. Rather than take the time, the expense and the possibility that the parolee may be found innocent of the new crime, the parolee is shunted back to prison for a technical reason. See *Sentencing*, supra, p. 362.

As observed in a recent article in *Time Magazine*, supra, p. 53:

"Even parole supervision is often cursory and capricious. Many

"Every citizen . . . is entitled to be substantively informed as to any governmental action which may affect his liberty or life. No governmental procedure may stand which fails to provide such information. To be both fairly and timely advised is fundamental to the basic concepts of due process. 'Clandestine due process' has never found favor or constitutional basis in courts of law. As this court said in *United States v. Owen*, 415 F.2d 383 (8 Cir. 1969): 'Inherent in the most narrow view of due process is the right to know of adverse evidence and the opportunity to rebut its validity and relevance. *Chernekoff v. United States*, (9 Cir. 1955) 219 F.2d 721.' *Id.* at 388." *United States v. Cummins*, 425 F.2d 646, 649, (8 Cir. 1970).

Accord, *Gonzales v. United States*, 348 U.S. 407 (1955); *Simmons v. United States*, 348 U.S. 397 (1955); *Sicurella v. United States*, 348 U.S. 385 (1955); *United States v. Nugent*, 346 U.S. 1 (1953); cf. *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 243 n. 6 (1968) (Harlan, J., concurring). Recent decisions have found a denial of due process to state prisoners whose paroles had been revoked without notice or an opportunity to be heard with counsel. See *Goolsby v. Gagnon*, . . . F.Supp. . . (E.D. Wis., Feb. 9, 1971); *Hester v. Craven*, . . . F.Supp. . . (C.D. Cal., Feb. 17, 1971); *State ex rel. Menechino v. Warden*, . . . N.Y.2d . . . (N.Y. Ct. App., Jan. 13, 1971). Cf. *Menechino v. Oswald*, 430 F.2d 403 (2 Cir. 1970) and *Sostre v. McGinnis*, . . . F.2d . . . (2 Cir., Feb. 24, 1971) (Part VI).

These decisions have relied strongly on the reasoning of *Mempa v. Rhay*, 389 U.S. 128 (1967), where the Court held that due process is required in probation revocation proceedings on deferred sentencing. The Seventh Circuit, in a distinguished court composed of Mr. Justice Clark,

parole agents handle more than 100 cases; one 15-minute interview per man per month is typical. The agents can also rule a parolee's entire life, even forbid him to see or marry his girl, all on pain of reimprisonment—a usually unappealable decision made by parole agents, who thus have a rarely examined effect on the repeater rate. To test their judgment, Criminologists James Robison and Paul Takagi once admitted ten hypothetical parole-violator cases to 316 agents in California. Only five voted to reimprison all ten men; half wanted to return some men but disagreed on which ones."

Retired, and Judges Cummings and Kerner, recently held that due process is required on revocation of probation proceedings without regard to whether the sentence was deferred. *Hahn v. Burke*, 430 F.2d 100 (7 Cir. 1970). The Fourth Circuit has also applied the principles of *Mempa* to probation revocation. *Hewett v. North Carolina*, 415 F.2d 1316 (4 Cir. 1969). The reasoning of these cases is controlling here. As the majority indicates, however, some courts have denied the claim of constitutional infringement. Most courts which so held rendered their opinion prior to the Supreme Court's decision in *Mempa*. Analysis of those decisions, and the majority opinion, demonstrates their reliance on traditional arguments which have been largely undermined by recent decisions.

RIGHT PRIVILEGE DOCTRINE

It is argued that the granting of parole is a matter of grace which is strictly in the discretion of the parole board; so that the parolee is not prejudiced as to any right upon revocation. While there may not be a "right" to parole or any other discretionary "privilege" in the first instance, see *Manecchino v. Oswald*, supra, once the discretion is exercised and the privilege granted the entitlement cannot be divested in a manner inconsistent with the requirements of due process. See *Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970). As the Supreme Court pointed out in *Goldberg*, there are situations in which the governmental interest involved outweighs the private interest. However, these situations usually involve an emergency in which the danger to the public health or safety is imminent.⁶

⁶ See R. O'Neil, "Of Justice Delayed And Justice Denied: The Welfare Prior Hearing Cases," 1970 Supreme Court Review 161, 169:

"There have been instances, as the majority opinion noted, in which a constitutional right to be heard has been postponed until after the completion of the contested action. But the circumstances justifying deferral of a conceded right to notice, personal appearance, and confrontation, are highly unusual. There are the classic 'emergency' cases—food is about to spoil and must be kept from grocers' shelves; a fraud is about to be perpetrated on unsuspecting securities purchasers; or a professional licensee is continuing to offer his services to trusting clients after having perpetrated malpractice. In these situations the reason for acting now and hearing later are incontestable. Moreover, there is usually an adequate remedy after the fact; if the victim of summary action

In the context of probation revocation, the Fourth Circuit has refuted the right privilege distinction:

"We are not impressed by the argument that probation is a 'mere' privilege, or a matter of grace, rather than a right and that, therefore, various constitutional mandates, including the right to counsel, should be held to be inapplicable. Even if a distinction exists between the components of the right-privilege dichotomy, when a state undertakes to institute proceedings for the disposition of those accused of crime it must do so consistently with constitutional privileges, even though the actual institution of the procedure was not constitutionally required. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (plurality opinion)." *Hewett v. North Carolina* supra, at 1322-1323.

In his dissenting opinion in *Rose v. Haskins*, 388 F.2d 91, 97, 100-101 (6 Cir. 1968), Judge Celebrezze points out the weakness of the right privilege distinction:

"In *Fleenor v. Hammond*, 116 F.2d 982 (6th Cir. 1941), supra, this Court granted that pardon was a matter of grace but pointed out that once pardoned the person pardoned was entitled to his liberty: a liberty that could be forfeited only by his breach of the conditions of the pardon. As indicated above, the act-of-grace assumption need not be so summarily granted, but, even if the liberty given the parolee is considered a privilege, the *Fleenor* decision is more commensurate with the protection given other so-called privileges by recent Supreme Court decisions. Cf. *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959)."

later prevails, he can be made whole or nearly whole through money damages.

"Apart from these emergency situations, there seems almost a general presumption that one who is constitutionally entitled to be heard at all should be heard before the change in status occurs." (Emphasis ours.)

Mr. O'Neil further comments:

"These distinctions revive the specter of the long-interred right-privilege dichotomy. For some years the Supreme Court has deliberately avoided these labels and their irrational effects." *Id.* at 179.

Judge Celebrezze thoroughly summarizes the law in this area and then points out:

See also *State ex rel. Menechino v. Warden, supra*.*

"In this country most interests of a citizen are protected from direct government action that does not conform to due process of law. Of course, due process has a flexible context; what process is due a person in one situation may not be due him in another, and a cynic might say that if due process has no effect, it does not apply. But to say that an interest is a privilege, therefore, constitutional rights do not attach only obscures the reasoning by which a decision is reached that due process considerations must yield to policies of countervailing importance. The method of reaching such a decision was indicated in *Cafeteria*:

"As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S. at 895, 81 S.Ct. at 1748.

"The 'precise nature of the government function' involved in the revocation of a parole is the determination of an adjudicatory fact: Has the parolee or has he not violated the conditions of his parole? The difficulty arises because all of the functions of administering a parole system are the responsibility of the same agency, which grants parole, supervises parole, and revokes parole. Many of the functions involve a certain amount of expertise in the application of principles of behavioral and sociological sciences, and some fears have been expressed that judicial interference in one function will disrupt the whole scheme.

"For the most part those fears have been supported by nothing more than the untutored intuition of the person expressing them; so they should be closely scrutinized in order to determine their validity." 388 F.2d at 101.

* Professor Davis, 1 Administrative Law Treatise § 7.11, p. 455 (1958), observes that "the courts are increasingly recognizing that the use of the privilege doctrine is, often unsound." He further points out:

"But if a right is an interest which is legally protected, and if a court gives legal protection to a privilege, does not the court turn the privilege into a right? Even if the answer to this question is yes, the proposition may still be perfectly sound that one who lacks a 'right' to a government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity. In tort law, the accident victim has no right to be helped by the passerby, but he has a right to careful and proper treatment by the passerby who volunteers to help. Like the passerby, the government may refuse altogether to help applicants for gratuities, but it cannot provide the help improperly; it cannot grant or withhold on the basis of racial or religious discrimination. The government could deny altogether the admission of Oklahoma to the Union, but it could not admit Oklahoma improperly, that is, with a condition that its capital must be at a particular place. A state can deny altogether a permit to a foreign corporation to do local business, but it cannot grant the privilege improperly, that is, on condition that suits

BALANCING OF INTERESTS.

In *Goldberg v. Kelly*, supra, the Supreme Court said:

"The extent to which procedural due process must be afforded the recipient [of governmental gratuity] is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.' See also *Hannah v. Larche*, 363 U.S. 420, 440, 442 (1960):" 397 U.S. at 262-263."

The majority opinion argues that the government's interest in summary revocation outweighs the parolee's interest in procedural rights, because: (1) the full panoply of criminal rights would overburden the administrative hearing process; (2) a hearing would interfere with the *parens patriae* relationship and thereby inhibit rehabilitation; (3) the prospect of full trials upon revocation will

against the corporation shall not be removed to a federal court." § 7.12, p. 456.

See also Note, "Re-Arrest of Parolees: Constitutional Considerations," 46 Wash. L. Rev. 173, 178 (1970).

⁹ In *Greene v. McElroy*, 360 U.S. 474, 496 (1959), the Court observed:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots."

deter parole boards from granting paroles in the first instance.

1. The majority expresses concern that "the full panoply of criminal rights" will unduly tax the administrative process. Neither the petitioners nor any of the authorities that recognize procedural due process have argued that a parolee is entitled to the "full panoply" of rights. Fact-finding processes can be flexible without being basically unfair. An adequate system can be developed which is something less than a full trial. *Boddie v. Connecticut*, ... U.S. ... (1971). And see *Davis*, supra, § 7.16, pp. 179-180 (1965 Supp.). The new Washington state procedure, for example, provides that a parolee accused of a violation must be served with the charges of the violation and shall be advised of his right to an on-site revocation hearing (which he may waive). Wash. Rev. Code Ann. §§ 9.95.120 et seq. (1969-70 Supp.). There is no indication that states which have adopted hearings for parole revocation have experienced significant difficulties.¹⁰ What little data is available does not justify alarm as to the effect of due process on revocation proceedings.¹¹ Experience in states which provide for parole revocation hearings and permit the parolee to retain counsel indicates that fears of havoc and ruin are exaggerated, if not unwarranted.¹² Further, there is no indication that the right of federal parolees to a hearing upon revocation, 18 U.S.C.A. § 4207, has in any way diminished the efficiency of the federal parole board. Professor Kadish has made an incisive observation in this regard:

¹⁰ See S. Rubin, "Developments in Correctional Law," *Crime and Delinquency* 185 (April 1970).

¹¹ See generally, B. Jacob and K. Sharma, "Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process," 18 Kan. L. Rev. 493, 540-550 (1970); R. Sklar, "Law and Practice in Probation and Parole Revocation Hearings," 55 J. Crim. Law 175, 197 (1964); S. Kadish, "The Advocate and the Expert—Counsel in the Peno-Correctional Process," 45 Minn. L. Rev. 803, 832-841 (1961).

¹² The majority's conclusory apprehension is not supported by a study of the parole revocation system in Michigan, which revealed:

"The number of parolees returned to prison as technical violators who elect to have a public hearing has been small since the law providing for such hearings was passed in 1937. Typically, five or six such hearings are held each year. The largest number of hearings held in a single year has been ten. The small number of public hearings is partially due to the care taken by parole officers in ascertaining the facts of a violation

"The problems of overburdened parole boards would appear remediable by measures directed to the problem rather than by the pursuit of measures which render the work of the boards less just and less adequate." 45 Minn. L. Rev. at 837-838.

2. I would have thought that *In re Gault*, 387 U.S. 1 (1967), closed the door to the *parens patriae* argument.¹³ It is a fiction to view the parole board and the parolee as having an identity of interest.¹⁴ The majority refers to

and their practice of refraining from initiating revocation procedures if the facts do not support the action. Most parolees brought before the board on charges of technical violations are quick to plead guilty to the counts cited against them." *Sentencing*, *supra*, at 355.

¹³ *Gault* addresses itself to the *parens patriae* argument in the context of juvenile delinquency hearings:

"These results [rehabilitation] were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence." 387 U.S. at 10. (Emphasis ours.)

The Court went on to point out that "proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty. . . . The constitutional and theoretical basis for this peculiar system is—to say the least—debatable." *Id.* at 17. "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." *Id.* at 19-20. The parallel to parole revocation procedures is obvious.

¹⁴ Professor Davis topically refutes the contention that the parole board and the parolee have an identity of interest which is interrupted by judicial procedural safeguards. In discussing *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963), cert. denied 375 U.S. 957 (1963), he says:

"The reasons for rejecting these various arguments of the majority are persuasive. The court's assertion that the prisoner and the Board have a 'genuine identity of interest' may have some plausibility concerning the Board's exercise of discretion after the Board has found the facts, but it has no reality at the point when the Board is finding facts that the prisoner is specifically denying; at that crucial point the interests are obviously opposed, not identical. Even if the Board 'occu-

the detrimental effect due process would have on rehabilitation. However, there is no concrete evidence to substantiate this assertion, just as the evidence does not indicate that the present system is particularly effective in rehabilitating parole violators. If the *absence* of due process has any effect on rehabilitation, however, it is most likely to be detrimental. Arbitrary action by officers of the law is more likely to breed resentment and disrespect than rehabilitation. The New York Court of Appeals recognized the cogency of the argument:

"(T)he parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Although few circumstances could better further that purpose than a belief on the part of such offenders in a fair and objective parole procedure, hardly anything could more seriously impede progress toward that important goal than a belief on their part that the law's machinery is arbitrary, too busy or impervious to the facts. The desired end can become a reality only by requiring obedience to the demands of due process and granting parolees a hearing at which they will be represented by counsel." *State ex rel: Menecchino v. Warden*, 267 N.E.2d 238, 243-44 (1971).¹⁵

pies the role of parent withdrawing a privilege," one may wonder whether a parent (or the Board) is acting justly by unnecessarily denying the child (or the parolee) a chance to explain or rebut the evidence against him. If the Board does not "adjudicate" when it finds facts from conflicting evidence, then the term "adjudicate" has lost its usual meaning. The theory that parole is a part of "rehabilitation" is a theory that may have promise for the future, but it is not the only theory that governs the thought and action of parole officers. One has only to interview members of the Federal Parole Board to learn that ideas of deterrence and retribution still have great force." Davis, *supra*, § 7.16, p. 175 (1965 Supp.)

¹⁵The dissent in the state decision of *Mempa*, which position was ultimately adopted by the Supreme Court, also underlines this fact:

"In fairness to any probationer, the procedures utilized should be designed to avoid the possibility, however remote, of revocations founded on accusations arising out of mistake, prejudice and caprice. The threat of arbitrary or whimsical commitment does not tend to encourage either cooperation or successful rehabilitation. Reformation can best be accomplished by fair, consistent, and straight-forward treatment of the individual." *Mempa v. Rhay*, 416 P.2d 104, 113 (Wash. 1966) (Hamilton, J. dissenting).

The point is that in *correctional* penology there is no arbitrary right to revoke parole. In effect, society tells the parolee that he may remain at liberty if he stays out of trouble. If the parolee does abide by the rules and his parole is revoked, without notice of the reasons or an opportunity to be heard, his resulting attitude of resentment and betrayal is not likely to improve his outlook on society and its rules. Arbitrary revocation can actually put a negative incentive on cooperating with his parole officer.

3. It is further argued that if due process is required at revocation proceedings there will be fewer paroles granted which will retard rehabilitation in the larger sense. The district court for the Eastern District of Wisconsin recently rejected this argument as unwarranted speculation and mere assertion since the "state has not shown in precisely what manner the burden of a hearing prior to revocation would lead to fewer paroles." *Goolsby v. Gagnon*, . . . F.Supp. . . , 8 Cr.L. 2403 (E.D. Wis. Feb. 9, 1971). In addition, this contention casts unwarranted aspersions on the dedication of parole boards. It assumes that parole board members would react vindictively to spite the legal process. It assumes that parole boards would deny paroles to otherwise deserving prisoners and thereby delay their optimum rehabilitation merely to save themselves a little time.¹⁶

On balance, it appears that there is no really substantial state interest in summary adjudication other than

See also Note, "Re-Arrest of Parolees: Constitutional Considerations," 46 Wash. L. Rev. 175, 179 (1970); Comment, "Due-Process and Revocation of Conditional Liberty," 12 Wayne L. Rev. 638, 650 (1966).

¹⁶ Practical considerations might further indicate that the predicted result of fewer paroles will not come to pass. The sheer weight of numbers might prevent any radical departure from the present level of paroles granted. With prisons grossly overcrowded and understaffed for proper correction and rehabilitation, it seems unlikely that a parole board would want to, or could if it wanted to, cease granting paroles and add to the logjam merely to serve their administrative convenience. Indeed, one commentator has noted that aside from rehabilitation, the primary purpose of parole is probably economics. Parole boards are often concerned with overcrowded prisons and the cost of feeding and clothing prisoners. Therefore, if a prisoner has met the minimum requirements and the chance for recidivism is not high, he will probably be released on parole. These financial considerations might also explain why parole violators are often reparaoled. Comment, *supra*, 12 Wayne L. Rev. at 640.

that of preserving the status quo. The individual's interest in maintaining his liberty, however restricted, his interest in maintaining whatever reputation he might have regained in the community, his interest in avoiding sudden and possibly disastrous interruptions in his home life and in his employment, coupled with society's interest in rehabilitating ex-convicts rather than embittering them through arbitrary and unfair treatment, all outweigh the state's minimal interest in summary adjudication.

PROBATION PAROLE DISTINCTION

The principle of *Mempa v. Rhay*, *Hahn v. Burke*, and *Hewett v. North Carolina*, supra, providing that there is a right to due process at probation revocation proceedings, is clearly applicable to parole revocations also:

"The principle which underlies the decision in *Mempa* is sufficiently broad to encompass the revocation of parole as well as of probation. In both, the decision to deprive an individual of his liberty turns on factual determinations, and we would say, as did the Supreme Court in the *Mempa* case (389 U.S., at p. 135), that 'the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case' * * * is apparent.'" *State ex rel. Menckino v. Warden*, ... N.Y.2d ... (N.Y. Ct. App. Jan. 13, 1971).

In *Warren v. Michigan Parole Board*, 23 Mich. App. 754, 179 N.W.2d 664, 670 n. 22 (1970), the court observed:

"We are mindful of the peculiar status of the paroled prisoner. Technically he occupies a different place in the law than the probationer. . . . Yet when the parolee and the probationer are accused of violations of their conditional status, the differences between them assume insignificant proportions.

"Of paramount concern to both of them is the impending loss of their liberty. It simply is not reasonable to suggest that in the face of this common threat to a constitutionally protected interest—liberty—the parolee should be denied procedural safeguards now freely available to the probationer.

"This correspondence [discretion of trial court to determine minimum sentence and discretion of parole board, to determining length of parole] serves to emphasize the incongruity of refusing to apply to parole revocation procedures the constitutional guarantees which accompany deferred sentencing."

In *Commonwealth v. Tilton*, 438 Pa. 328, 249 A.2d 549 (1969); the Pennsylvania Supreme Court held that after *Mempa v. Rhay*, supra, to distinguish probation and parole "is completely untenable."¹⁷

CONSTRUCTIVE CUSTODY THEORY

It is urged that a parolee is still in the constructive custody of prison authorities even though not in their physical custody. In effect, it is said parole is an extension of the prison walls and therefore, judicial involvement in parole revocation proceedings is an unwarranted interference with "prison discipline."

This proposition seems to be based on the assumption that an incarcerated prisoner has no rights. However, it is settled that prison officials may not interfere with a prisoner's basic constitutional rights. See e.g. *Cooper v.*

¹⁷ Both parole and probation "provide for the return of a convicted criminal to society under limited conditions, with failure to conform to such conditions resulting in a loss of the conditional liberty status and reincarceration." Comment, supra, 12 Wayne L. Rev. at 639. Mr. Sol Rubin, Counsel for the National Council on Crime and Delinquency, has also pointed to the similarities. "In fact, the status of the probationer and parolee are in the strongest correspondence—in the granting of the status, being dependent on the discretion of judge or board; in the nature of the conditions of release (more or less—or exactly—identical); in the process of revocation; and even in the decision as to what their continued status will be, whether continued conditional release or incarceration." S. Rubin, "Due Process Is Required in Parole Revocation Proceedings," June 1963 *Federal Probation* 42, at 45.

See also *Goolsby v. Gannon*, . . . F.Supp. . . . , 8 Cr. L. 2403 (E.D. Wis., Feb. 9, 1971), where Judge Reynolds followed the rationale of *Hahn v. Burke*, supra, and held that there is a constitutional right to due process in a state parole revocation hearing, including the right to a hearing on the factual basis of the revocation and the right to the assistance of counsel. The court held: "The central fact, which applies to both probation and parole revocations, is that revocation is the event which operates to deprive a man of his liberty. . . . Hence, I find no substantial degree of difference between the 'grievous loss' to be suffered by a probation facing revocation and a parolee facing revocation which would dictate reaching a different result with regard to the requirement of a hearing." . . . F.Supp. at

Pate, 378 U.S. 546 (1964). Prison discipline may not impair a prisoner's access to the courts. See *Johnson v. Avery*, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546, 549 (1941). In the recent Second Circuit opinion of *Sostre v. McGinnis*, . . . F.2d . . . (2 Cir. Feb. 24, 1971), Judge Kaufman observed:

"In thus rejecting Judge Motley's conclusions, however, we are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary actions of prison officials. *If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined.* This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation; informed of the evidence against him, see *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and afforded a reasonable opportunity to explain his actions." (Emphasis ours.)

Judge Blackmun (now Mr. Justice Blackmun) thoroughly pointed out the traditional position of the Eighth Circuit in *Jackson v. Bishop*, 404 F.2d 571 (8 Cir. 1968). This court's position has been that while it is reluctant to interfere with a prison's internal discipline, "a prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow his through the prison doors." *Id.* at 576. See also *Meola v. Fitzpatrick*, . . . F.Supp. . . , 8 Cr. L. 2404 (D. Mass., Feb. 8, 1971); holding that a state violated the prisoner's Fourteenth Amendment rights by imposing prison disciplinary measures which substantially affected his interests (forfeiture of earned good time) so that he was entitled to procedural safeguards, "at least the elementary ones of notice of the charges against him and an opportunity to reply to them." (Emphasis ours.) Accord, *Carothers v. Follette*, 314 F.Supp. 1014 (S.D. N.Y.

1970); *Sostre v. Rockefeller*, 312 F.Supp. 863 (S.D. N.Y. 1970).²⁸

Mr. Justice Jackson, dissenting in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), observed:

"Security is like liberty in that many are the crimes committed in its name. . . . The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of the enforcer undetected and uncorrected." *Id.* at 551.

²⁸ Aside from the error of the unstated premise of the majority's theory of constructive custody, the commentators have amply illustrated the fictional basis of the theory of the "extension of the prison walls."

"Equating actual and constructive custody seems unrealistic. While the parolee is inhibited somewhat by the conditions of his parole, which commonly include restrictions on association and travel, it cannot be seriously contended that these restrictions are comparable to the restrictions imposed upon an actual prisoner." Note, *supra*, 46 Wash. L. Rev. at 176-177.

Another observer argues that the custody theory is an attempt to attach unconstitutional conditions to the grant of a privilege. W. White, "The Fourth Amendment Rights of Parolees and Probationers," 31 U. Pitt. L. Rev. 167, 178-181 (1969). Deeming the constructive custody theory "at most an embellishment that should not be dispositive of the constitutional questions," another writer has pointed out:

"This theory is dependent upon the fiction that conditional liberty does not liberate the prisoner but merely 'pushes back the prison walls'. . . . This fiction, however, is not a satisfactory basis for negating the applicability of constitutional rights. It is obvious that as inhibited as the parolee may be, there is no comparison between the freedom he enjoys while on parole and imprisonment. Thus, the metaphorical *extension of prison walls-constructive custody theory* is an insufficient basis, by itself, for holding that conditional liberty is not circumscribed by constitutional protections. This theory like the contract theory is generally discussed after the court has made the right-privilege distinction and reached a 'no procedural due process' conclusion." Comm~~on~~⁶², *supra*, 12 Wayne L. Rev. at 646.

The author further argues that if the constructive custody theory is to be applied with logical consistency, then since the parolee is still technically in prison he *must* be given credit for parole time against his sentence, and yet this is not the case in practice. *Id.* at 647. Mr. Sol Rubin has also argued that abandoning the fiction of constructive custody would make parole laws more consistent with their rehabilitative purpose. June 1963 *Federal Probation* at 45.

Even an *alien* who has become a lawful resident of the United States cannot be deprived of due process of law, and though he may be subject to expulsion he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-597 (1953); *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903). See also Davis, *supra*, § 7.15.

CONTRACT THEORY

It is argued that parole is in the nature of a contract to which the parolee is a party. By having agreed to the terms of the parole, the parolee is in no position to complain about the lack of process in revocation. Any comparison with contract law is unrealistic. The "parties" are nowhere equal in bargaining strength and the parolee cannot object to provisions he thinks are unreasonable. The parole agreement is presented on a take it or leave it basis, and to a prisoner with the prospect of obtaining his freedom there is no reasonable choice. Courts reject such rationalizations when dealing with adhesive contracts in insurance law¹⁹ and in equating the relationship of the consumer with the manufacturer in the field of product liability.²⁰ It is a strange anomaly to fictionalize its use when dealing with an individual's personal liberty.

Judge Celebrezze's dissent in *Rose v. Haskins*, *supra*, further points up the fallacy of the contract argument. He points out the erroneous historical basis for the argument and how these matters are determined by the public demand rather than the consent of the prisoner.

"So a parole is not a 'contract' in the traditional sense of that word, and, if the theory only means that the State in fact attached such a condition to the parolee's freedom, the question remains whether the State can attach such a condition. For if the negative pregnant that is implicit in the contract theory is true (that if the parolee had not agreed to summary revocation he would have had the right to a hearing), then

¹⁹ See *American Service Mut. Ins. Co. v. Bottum*, 371 F.2d 6 (8 Cir. 1967).

²⁰ Cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

that theory has recognized that a right to a hearing is inherent in the revocation situation. Waiver of such a valuable right is not to be lightly determined, and when the 'choice' of the parolee is to remain in prison or accept such a burdensome provision, the 'choice' to accept parole can hardly be termed a voluntary waiver of the right to a hearing. Therefore, the two legal theories advanced to justify the denial of a hearing have a dubious basis both in history and in logic." 388 F.2d at 100.

The Seventh Circuit recognized the fallacy of the contract argument and adopted the reasoning of Judge Celebrezze's dissent, pointing out that the parties do not enter the "contract" on an equal basis. *Hahn v. Burke*, supra, 430 F.2d at 104-105. See also Comment, "Rights Versus Results: Quo Vadis Due Process for Parolees," 1 Pac. L. J. 321, 338 (1970).

ADMINISTRATIVE PROCEEDING

Parole revocation is an administrative, rather than a judicial, proceeding; therefore, according to the majority opinion, it is not necessary to conduct the revocation with regular procedures or provide notice to the parolee. The Michigan Court of Appeals has recognized that "the artificial designation of certain proceedings as 'administrative' will not withstand judicial scrutiny where the challenged tribunal has the power to incarcerate the accused." *Warren v. Michigan Parole Board*, supra, 179 N.W.2d at 669-670 n. 20. Professor Kenneth Culp Davis, one of the leading authorities on administrative law, also points out that an "administrative" classification does not negate the need for a hearing: "When adjudicative facts are in dispute, our legal tradition is that the party affected is entitled not only to rebut or explain the evidence against him but also to 'confront his accusers' and to cross-examine them." Davis, supra, § 7.05 at p. 426.

HABEAS CORPUS ON ARBITRARY ABUSE

Although a prisoner is said to have no constitutional right to a hearing upon revocation of his parole, the majority opinion states that the parolee cannot be made the subject of "arbitrary" action. This is an attempt to ward

off evil spirits by tossing a dart into the fog. It smacks of self-contradiction. This seems to be a recognition of the potentially dangerous consequences of explicitly denying any legal recourse to parolees whose paroles are revoked without procedural safeguards. However, this is merely a precatory warning, since the effect of the decision is to emasculate any effort to prevent the parolee from being made the subject of arbitrary action.²¹ At oral argument the state conceded, with logical consistency, that there is an arbitrary right to revocation without explanation or rational basis. If it is true that there is no constitutional right to a hearing on parole revocation, the inevitable logical corollary must be that the state's power to revoke is absolute. The majority's ambivalent stand is even more confusing here when one considers that the present case deals with prisoners' claims under petitions seeking writs of habeas corpus. The petitioners are seeking a hearing to challenge an arbitrary revocation of parole. The majority opinion paradoxically denies this opportunity by deferring to the state's adjudication that parole revocation is a matter of absolute discretion and cannot be challenged.²²

The argument that habeas corpus can later be available comes too late to effectively prevent unlawful punishment. Cf. *Oestereich v. Selective Service Bd.*, supra; *Gutknecht v. United States*, 396 U.S. 295 (1969). Such a remedy is illusory when applied to an arbitrary parole revocation.

²¹ This is the same logical dilemma which Justice Brennan pointed out in his dissent to *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 901 (1961):

"In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an 'arbitrary' reason, but no right to be told in detail what the reason is, or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution. This is an internal contradiction to which I cannot subscribe."

²² The majority opinion refers to *Curtis v. Bennett*, 131 N.W.2d 1 (Iowa 1964), where the Iowa Supreme Court says that habeas corpus will lie where the parolee alleges that he is not the party intended, that the revocation is a forgery, or that the officials attempting to revoke are within authority. These matters deal with the state's power to act and do not meet the constitutional issues raised when authority is exercised in the manner provided by law. Also, these limitations are matters of mere expediency allowed by state law and do not attain constitutional proportions.

First the individual prisoner is taken summarily from private life and again regimented to one in a penitentiary. This is a drastic prerequisite to filing habeas corpus. Contrary to the spirit of the Great Writ, months or years may go by before a prisoner is given a hearing in a state court. State courts may well reason, as they have in the instant cases, that no hearing is ever necessary since the power of revocation is absolute. As in the instant cases, a hearing in the federal courts may be equally elusive. Clearly, habeas corpus fails to provide an adequate prophylaxis where an individual's parole is wrongfully revoked. This is especially true where a simple explanation or presentation of facts might have demonstrated there was in fact no violation of parole.²³

COMITY

The majority emphasizes that federal courts should show judicial deference to state rights and not intervene in areas which traditionally have been matters of state concern. The majority opinion relies on the recent case of *Younger v. Harris*, ... U.S. ... (1971). I have no disagreement with the proposition that the doctrine of "comity" should deter federal interference on constitutional issues where the state has a pending opportunity to act. However, overlooked is that *Younger* and a companion case, *Perez v. Ledesma*, ... U.S. ... (1971), recognize that if the state court misses the constitutional mark there can be federal review "by certiorari or to appeal to this Court [the Supreme Court] or in a proper case on federal habeas corpus." 39 U.S.L.W. 4214, 4215 (U.S.

²³ Apropos is Mr. Justice Murphy's concurring statement in *Estep v. United States*, 327 U.S. 114, 131 (1946):

"There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation. Every fiber of the Constitution and every legal principle of justice and fairness indicate otherwise. The reports are filled with decisions affirming the right to a fair and full hearing, the opportunity to present every possible defense to a criminal charge and the chance at some point to challenge an administrative order before punishment. Those rudimentary concepts are ingrained in our legal framework and stand ready for use whenever life or liberty is in peril."

Feb. 23, 1971). In the instant case the petitioners have exhausted their state remedies and *they are now here on habeas corpus*. All *Younger* and its companion case have set out to do is to require comity where a state court proceeding is already pending. *Younger, et al.*, did not mean we are to revert to 50 different applications of the Bill of Rights in deference to state's rights. *Younger* did not mean that a federal court must sit by and allow a state to misconstrue the federal Constitution. This is far from the result reached by the Supreme Court in the recent decisions of *Boddie v. Connecticut*, ... U.S. ... (1971); and *Wisconsin v. Constantineau*, ... U.S. ... (1971). The Iowa parole revocation proceedings are either within or without the Fourteenth Amendment. Deference to state adjudication is not relevant here. Judicial deference to state interests cannot change the nature of an unconstitutional proceeding.

In the preface of his recent book Professor Davis observes:

"[T]he greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made." *Discretionary Justice*, p. v (1969).

I think that wherever a state exercises arbitrary discretion to the detriment of individual liberty, the due process clause of the Fourteenth Amendment is still the applicable safeguard.

I would reverse and direct the district court to grant the writs of habeas corpus unless the state parole board grants an immediate hearing fully informing the petitioners of the charges made back in 1969 and allow petitioners to present evidence relevant to the denial of the charges.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20328.

September Term, 1970

JOHN J. MORRISSEY, #29739,
Appellant.

vs.

LOU V. BREWER, Warden,
Appellee.

Appeal from the
United States Dis-
trict Court for the
Southern District of
Iowa.

[Filed Apr 21 1971, Robert C. Tucker, *Clerk*]

This Cause came on to be heard on the original files of the United States District Court for the Southern District of Iowa and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from entered April 15, 1970, in this cause, be, and the same is hereby, affirmed. Mandate shall issue forthwith.

April 21, 1971

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20425.

September Term, 1970

G. DONALD BOOHIER, #29509,
Appellant.

vs.

LEE AND O'BRIEN COUNTIES, AND
THE STATE OF IOWA, *et al.*,
Appellees.

Appeal from the
United States Dis-
trict Court for the
Southern District of
Iowa.

[Filed Apr 24 1971, Robert C. Tucker, *Clerk*]

This Cause came on to be heard on the original files of the United States District Court for the Southern District of Iowa and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from entered June 10, 1970, in this cause, be, and the same is hereby, affirmed. Mandate shall issue forthwith.

April 21, 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20425.

G. DONALD BOOHER, #29509,
Appellant,

VS.

LEE AND O'BRIEN COUNTIES, AND
THE STATE OF IOWA, *et al.*,
Appellees.

CASE NO. 20425
Appeal from the
United States Dis-
trict Court for the
Southern District of
Iowa.

[Received May 27 1971 U.S. Court of Appeals
Eighth Circuit]

PETITION FOR REHEARING AND FOR THE
ISSUANCE OF THE WRIT OF HABEAS CORPUS
UPON THE MANDATE OF THE COURT ISSUED
IN THIS CASE EN BANC ON APRIL 21, 1971

COMES NOW, G. DONALD BOOHER, APPELLANT
AND PETITIONER, AND FOR CAUSE OF ACTION
MOVES THE COURT TO ISSUE MANDATE IN THIS
CASE UPON THE GROUNDS SET FORTH BY ITS
DECISION OF APRIL 21, 1971, AS SET OUT ON
PAGE'S FIVE (5) AND NINE (9) OF SAID OPINION,
BY DIRECTING THE DISTRICT COURT OF IOWA,
LOCATED AS THE FEDERAL DISTRICT COURT OF
IOWA IN AND FOR THE SOUTHERN DISTRICT OF
IOWA, CENTRAL DIVISION, DES MOINES, IOWA,
FORTHWITH CAUSING THE WRIT OF HABEAS
CORPUS TO ISSUE FORTHWITH SETTING THE
APPELLANT'S AT LIBERTY FOR THE FOLLOWING
REASONS, TO-WIT:

STATEMENT OF THE CASE

ON APRIL 29, 1966, APPELLANT PETITIONER G.
DONALD BOOHER, WAS SENTENCED TO A TERM
OF TEN (10) YEARS IN THE IOWA STATE PENI-
TENTIARY LOCATED AT FORT MADISON, IOWA

FROM THE O'BRIEN COUNTY DISTRICT COURT OF IOWA, FOR VIOLATION OF SECTION 718.1 IOWA CODE 1962.

THE APPELLANT PETITIONER UNDER STATE STATUTE REQUIRED TO SERVE A PERIOD OF FOUR (4) YEARS EIGHT (8) MONTHS AND TEN (10) DAYS, IN THE CUSTODY OF THE OFFICE OF THE WARDEN, SUBJECT TO PAROLE AND A LOWER GRADE OF PUNISHMENT, AT ANY TIME AFTER COMMITMENT THEREOF.

YOUR APPELLANT PETITIONER SERVED A PORTION OF HIS TERM ON PAROLE UNDER THE CUSTODY OF THE WARDEN, FROM NOVEMBER 14, 1968 TO SEPTEMBER 24, 1969, WITHOUT CREDIT BY THE WARDEN FOR SUCH PERIOD OF THE TERM SERVED WHILE ON PAROLE.

YOUR PETITIONERS TERM AS INVOKED BY THE SENTENCING COURT EXPIRED JANUARY, 1971, AND HE IS NOW AND HAS BEEN UNCONSTITUTIONALLY REQUIRED TO BE TWICE PUNISHED BY THE TWICE SERVING OF HIS TERM OF CUSTODY SERVED ON PAROLE IN THE CUSTODY OF THE WARDEN, THROUGH THE DENIAL OF CREDIT OF TERM TIME ON PAROLE ALREADY SERVED IN VIOLATION OF THE FIFTH (5) AND FOURTEENTH (14) AMENDMENTS OF THE UNITED STATES CONSTITUTION.

AUTHORITIES IN SUPPORT OF GROUNDS FOR ISSUANCE
OF WRIT UPON MANDATE

I.

THAT THE 5th, 8th, AND 14th AMENDMENTS OF THE UNITED STATES CONSTITUTION PROHIBITS THE DENIAL OF CREDIT OF TIME ALREADY SERVED IN THE CUSTODY OF THE WARDEN OF THE TERM IN TIME SERVED WHILE ON PAROLE UNDER THE CUSTODY OF THE WARDEN, AND ANY TERM DOUBLY SERVED, CONSTITUTES DOUBLE JEOPARDY, EVEN THOUGH IT BE A LOWER GRADE OF PUNISHMENT IN THE CUSTODY OF THE WARDEN FOR THE TERM ASSESSED BY THE COMMITTING COURT OF RECORD.

AUTHORITIES

STATE VS. HUNTER, 100 N.W. 510 at PAGE 513, RE SECTION 687.5 IOWA CODE 1966 et seq. "PAROLE RELATES TO AN ADMINISTRATIVE ACTION TAKEN AFTER THE CONVICT HAS SERVED A PORTION OF HIS SENTENCE BEHIND PRISON WALLS. IT IS NOT A SUSPENSION OF SENTENCE, BUT, A SUBSTITUTION DURING THE CONTINUANCE OF THE PAROLE, OF A LOWER GRADE OF PUNISHMENT, BY THE CONFINEMENT IN THE LEGAL CUSTODY AND UNDER THE CONTROL OF THE WARDEN WITHIN THE SPECIFIED PRISON BOUNDS OUTSIDE THE PRISON FOR THE CONFINEMENT WITHIN THE PRISON ADJUDGED BY THE COURT." *BOOHER VS. LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, ET AL.*, CASE NO. 20425, DECIDED APRIL 21, 1971, 8 Cir. Ct. APPEALS.

ASHE VS. SWENSON, 90 S.Ct.Rep. 1189 Note 1, page 1191, QUOTE "THERE CAN BE NO DOUBT OF THE "RETROACTIVITY" OF THE COURT'S DECISION IN *BENTON VS. MARYLAND*, 89 S.Ct.Rep. 2056 at page 2058. IN *NORTH CAROLINA VS. PEARCE*, 89 S.Ct.Rep. 2072 (p. 2082), 395 U.S. 711, 23 L.E. 2d 656; DECIDED THE SAME DAY AS *BENTON*, THE COURT UNANIMOUSLY ACCORDED FULLY RETROACTIVE EFFECT TO THE *BENTON* DOCTRINE."

NORTH CAROLINA VS. PEARCE, 89 S.Ct. Rep. 2072, AT PAGE 2082, QUOTE: "Op.J.BLACK, . . . I AGREE WITH THE COURT THAT THE DOUBLE JEOPARDY CLAUSE PROHIBITS THE DENIAL OF CREDIT FOR TIME ALREADY SERVED."

CONCLUSION

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT THE COURT SHOULD CONSIDER THIS ISSUE FOR REHEARING SOLELY AND ONLY FOR THE PURPOSES OF THE ISSUANCE OF MANDATE THAT THE WRIT OF HABEAS CORPUS IS SUE ON THIS ACKNOWLEDGED POINT OF CONSTITUTIONAL LAW, AND TO PREVENT THE APPELLANT PETITIONER G. DONALD BOOHER, FROM SUFFERING ANY FURTHER INVOLUNTARY

SERVITUDE IN SLAVE LABOR FOR THE STATE OF IOWA AND AT THE HANDS OF THE JUDGES OF THIS COURT OF THE UNITED STATES OF AMERICA DUTY BOUND BY OUR CONSTITUTION TO SET HIM AT LIBERTY FOR THE FOREGOING REASONS AS GROUNDS THEREFORE.

YOUR PETITIONER APPELLANT FURTHER PETITIONS THIS COURT OR ANY JUDGE THEREOF TO DIRECT THAT HE BE RELEASED FROM SUCH CRUEL AND UNUSUAL PUNISHMENT OF DOUBLE JEOPARDY UPON PERSONAL RECOGNIZANCE BOND UNTIL THERE IS A FINAL JUDGMENT IN THIS CASE, FOR THE GROUNDS HEREINTOFORE SET FORTH IN PETITION FOR REHEARING AND REDRESS UNDER THE EQUAL PROTECTION OF THE LAWS CLAUSES OF AMENDMENT 14 SECTION 1, U. S. CONSTITUTION, FORTHWITH.

DONE THIS 30 DAY OF APRIL, 1971.

BY: G. DONALD BOOHER, #29509

G. DONALD BOOHER, APPELLANT
PETITIONER

POB 316, IOWA STATE PENITENTIARY
FORT MADISON, IOWA,

SUBSCRIBED AND SWORN TO BEFORE ME THIS
30 DAY OF APRIL, 1971, FT. MADISON, IOWA.
NOTARY PUBLIC IN AND FOR LEE COUNTY, IOWA
MY COMMISSION EXPIRES JULY 4th, 1972.

Upon Refusal of Notary

Witnessed By:

C. S. Cummings

Robert Miller

APPROVED BY:

W. DON BRITTIN, JR., ATTY. AT
LAW, DES MOINES, IOWA,
COUNSEL FOR APPELLANT PETITIONER.

(ORDER DENYING PETITION OF APPELLANT
OF JUNE 7, 1971 and AFFIDAVIT OF
APPELLANT OF JUNE 7, 1971)
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20425

September Term, 1970

G. DONALD BOOHER,

Appellant,

vs.

LEE AND O'BRIEN COUNTIES, AND
THE STATE OF IOWA, *et al.,*

Appellees.

} Appeal from the
United States Dis-
trict Court for the
Southern District of
Iowa.

[Filed Jun 7 1971, Robert C. Tucker, *Clerk*]

Subsequent to the issuance of our mandate in this cause we have received, through counsel for appellant, pro se pleadings from the appellant entitled "Petition for Rehearing and for Issuance of Writ of Habeas Corpus upon Mandate of the Court Issued in this case En Banc on April 21, 1971" and "Affidavit of Intent." Having carefully considered the pleadings the Clerk of this Court is hereby directed to file them and, having been so filed, they are denied in all respects.

June 7, 1971

SUPREME COURT OF THE UNITED STATES

No. 71-5103

John J. Morrissey and
G. Donald Booher, *Petitioners*,

v.

Lou V. Brewer, *Warden*.

On petition for writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 20, 1971

IN THE
Supreme Court of the United States

SEPTEMBER TERM, 1971

No. 71-5103

Supreme Court, U.S.

FILED

FEB 22 1972

E. ROBERT SEAVER, CLERK

JOHN J. MORRISSEY and
G. DONALD BOOHER,

Petitioners,

v.

LOU V. BREWER, WARDEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF

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John J. Morrissey and
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SUBJECT INDEX

| | <u>Page</u> |
|--|-------------|
| TABLE OF CASES & OTHER CITATIONS | ii |
| OPINIONS OF THE COURTS BELOW | 1 |
| STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED | 2 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 2 |
| QUESTION PRESENTED FOR REVIEW | 3 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF ARGUMENT | 7 |
| ARGUMENT | 8 |
| I. Due Process Applies to Revocation of Parole Hearing, Notwithstanding the Fact that Parole May Be Considered a "Privilege" and Not a "Right" | 11 |
| II. A Parolee's Interest in Remaining at Liberty Greatly Outweighs the State's Interest in Summary Adjudication | 14 |
| III. Revocation of Parole Is a "Critical Stage" in Criminal Proceedings and the Requirements of Due Process Are Applicable Thereto | 19 |
| IV. The "Contract Theory" Does Not Support the Position that Parole May Be Revoked Without a Hearing | 23 |
| V. The "Constructive Custody Theory" Does Not Support the View that Parole May be Revoked Without a Hearing | 24 |
| VI. Due Process Requires Notice of a Hearing, an Opportunity To Be Heard, an Opportunity To Confront and Cross-Examine Witnesses, and an Opportunity for the Parolee To Present Evidence on His Own Behalf | 26 |
| CONCLUSION | 29 |

TABLE OF CASES AND OTHER CITATIONS

| | Page |
|---|---------------------------|
| Ashworth v. U.S., 391 F.2d 245 (6th Cir. 1968) | 21 |
| Bearden v. South Carolina, 443 F.2d 1090 (4th Cir. 1971) | 10, 20, 21 |
| Bey v. Connecticut, 443 F.2d 1079 (2nd Cir. 1971) | 11, 14 |
| Burns v. U.S., 287 U.S. 216 (1932) | 24 |
| Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) | 11 |
| Clutchette v. Procunier, 328 F.Supp. 767 (N.D. Cal. 1971) | 25 |
| Cohen, The Legal Challenge to Corrections: Implications for Manpower and Training, Joint Commission Correctional Manpower and Training (1969) | 22 |
| Cole v. Holliday, 171 N.W.2d 603 (Iowa 1969) | 21 |
| Curtis v. Bennett, 351 F.2d 931 (8th Cir. 1965) | 9 |
| Curtis v. Bennett, 256 Iowa 1164, 131 N.W.2d 1 (1964) | 9 |
| Dawson, Sentencing, the Decision as to Type, Length, and Conditions of Sentence, Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States (1969) | 16 |
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| Gardels v. Brewer, 190 N.W.2d 803 (Iowa 1971) | 9 |
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| Goolsby v. Gagnon, 332 F.Supp. 460 (E.D. Wis. 1971) | 10 |
| Greene v. McElroy, 360 U.S. 474 (1959) | 11 |
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| Hannah v. Larche, 363 U.S. 420 (1960) | 11 |
| Hewert v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) | 21 |
| In Re Gault, 387 U.S. 1 (1967) | 18 |
| Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 423 (1951) | 11 |
| Mempa v. Rhay, 389 U.S. 128 (1967) | 8, 10, 19-22, 28 |
| Morrissey v. Brewer, 443 F.2d 442 (8th Cir. 1971) | 9, 10, 15, 18, 23 |
| Murray v. Page, 429 F.2d 1359 (10th Cir. 1970) | 10 |

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| Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971) | 25 |
| Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968) | 20 |
| Sections 247.5, 247.9, 247.12, Code of Iowa (1971) | 2-3, 8-9, 26 |

IN THE
Supreme Court of the United States

SEPTEMBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY, and
G. DONALD BOOHER,

Petitioners,

v.

LOU V. BREWER, WARDEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF

OPINIONS OF THE COURTS BELOW

The Orders of the United States District Court for the Southern District of Iowa denying the Petitioners' respective Petitions for Writ of Habeas Corpus have not been reported. They are, however, reproduced in the Single Appendix filed herein at pages 70-71 and 113-14 thereof.

The Opinion of the United States Court of Appeals for the Eighth Circuit, affirming the above referred to Orders of the District Court, is reported at 443 F.2d 942 (8th Cir. 1971).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

The Judgments of the United States Court of Appeals for the Eighth Circuit were entered on April 21, 1971. Said Judgments by the Court of Appeals affirmed the prior Orders of the United States District Court for the Southern District of Iowa denying the Petitioners' respective Petitions for Writ of Habeas Corpus. A Petition for Rehearing filed by the Petitioner Booher was denied by the Court of Appeals on June 7, 1971. The Petitioners' respective Motions for Leave to Proceed in Forma Pauperis and joint Petition for Writ of Certiorari were filed in this Court on July 19, 1971, within 90 days of the entry of the Judgments of the Court of Appeals and within 90 days of the Order of the Court of Appeals denying Petitioner Booher's Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 2101 (c). On December 20, 1971, this Court granted the Petitioners' Motions for Leave to Proceed in Forma Pauperis and granted the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

...nor shall any state deprive any person of life, liberty, or property, without due process of law;

Sections 247.5, 247.9, 247.12, Code of Iowa (1971):

247.5 Power to parole after commitment—detainers.

The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be a sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole.

247.9 Legal custody of paroled prisoners. All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled.

247.12 Parole time not counted. The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole be revoked.

QUESTION PRESENTED FOR REVIEW

The question presented for review in these cases is whether the rights guaranteed to these Petitioners by the due process clause of the Fourteenth Amendment to the Constitution of the United States were violated by the State of Iowa by the action of the Iowa Board of Parole in revoking the Petitioners' respective paroles without providing either of said Petitioners a prior evidentiary hearing to establish the fact of parole violation, at which Petitioners could confront and cross-examine the witnesses upon whose testimony their respective paroles were revoked and at which Petitioners could present evidence on their own behalf.

STATEMENT OF THE CASE

The case herein concerns two separate Petitions for Writ of Habeas Corpus which were denied by the United States District Court for the Southern District of Iowa on April 15, 1970 and June 10, 1971, respectively. Jurisdiction in the District Court was, in both cases, based upon 28 U.S.C. § 2254. The Orders denying the respective Petitions for Writ of Habeas Corpus were both appealed to the United States Court of Appeals for the Eighth Circuit, consolidated by that Court, heard by that Court *en banc*, and affirmed. A brief, factual and procedural history of each of the cases is set forth in the following paragraphs.

PETITION OF JOHN J. MORRISSEY:

On January 5, 1967, Petitioner John J. Morrissey, herein referred to as "Morrissey," entered a plea of guilty to a County Attorney's Information charging him with false uttering of a check and was, on the same date, sentenced by the Linn County District Court in Cedar Rapids, Iowa, to confinement in the Iowa State Penitentiary for a term not exceeding seven (7) years (A. 42-43). Subsequently, on June 20, 1968, Morrissey was granted a parole by the Iowa Board of Parole and released from the Iowa State Penitentiary (A. 30). On or about January 24, 1969, he was arrested in Cedar Rapids, Iowa, for parole violation, confined in the Linn County Jail in Cedar Rapids, Iowa (A. 65-69), and subsequently, on January 31, 1969, an Order was entered by the Iowa Board of Parole revoking his parole and ordering that he be returned to the Iowa State Penitentiary (A. 30).

Morrissey was not, at any time during any of the proceedings with respect to the parole revocation which caused him to be returned to the Iowa State Penitentiary, granted a hearing or other opportunity to question, challenge or even become aware of the facts which formed the basis of his alleged parole violation, nor was he granted any

opportunity of confronting or cross-examining those upon whose testimony his parole was revoked, or to present evidence on his own behalf.

On June 25, 1969, Morrissey petitioned the District Court of the State of Iowa in and for Lee County for Writ of Habeas Corpus, alleging that his parole had been revoked without a hearing and without appointment of counsel. Said Petition was denied by said Court on the following day (A. 54-58). Thereafter, on July 8, 1969, Morrissey filed a Petition for Writ of Habeas Corpus in the Supreme Court of Iowa. This Petition was dismissed on July 25, 1969 on the grounds that said Petition was not made to the Court or Judge most convenient to the Petitioner, as required by Iowa law; that the legality of his imprisonment had been adjudged by a previous ruling on his Petition for Writ of Habeas Corpus to the Lee County District Court; and that if he was entitled to any relief, his remedy would be to appeal the denial of his Petition by the Lee County District Court (A. 36).

On August 11, 1969, Morrissey filed a Notice of Appeal to the Iowa Supreme Court from the denial of his Petition for Writ of Habeas Corpus by the Lee County District Court (A. 60). This appeal was summarily dismissed on September 15, 1969, on the grounds that the Notice of Appeal was not timely filed (A. 37).

Having exhausted his state remedies, Morrissey then filed, on September 12, 1969, his Petition for Writ of Habeas Corpus to the United States District Court for the Southern District of Iowa (A. 3-7). This Petition was denied on April 15, 1970 (A. 70-71). Notice of Appeal from said denial was filed on April 21, 1970, considered by the District Court to be an Application for Certificate of Probable Cause pursuant to 28 U.S.C. § 2253, and denied on April 21, 1970 (A. 72-73, 74).

On June 3, 1970, the United States Court of Appeals for the Eighth Circuit granted Petitioner's Application for Certificate of Probable Cause and appointed counsel to

represent Petitioner on his appeal (A. 75). The denial of this Petitioner's Petition by the District Court was affirmed by 4-3 Opinion of the Court of Appeals *en banc*, the Opinion and Judgment affirming the Order of the District Court being filed on April 21, 1971 (A. 119-54, 155).

PETITION OF G. DONALD BOOHER:

On April 29, 1966, Petitioner G. Donald Booher, herein referred to as "Booher," entered a plea of guilty to a County Attorney's Information charging him with forgery and was, on the same date, sentenced by the O'Brien County District Court, Primghar, Iowa, to confinement in the Iowa State Penitentiary for a term not exceeding ten (10) years (A. 81). Subsequently, on November 14, 1968, Booher was granted a parole and was released from the Iowa State Penitentiary (A. 110). On or about August 28, 1969, he was arrested for parole violation and confined to the O'Brien County Jail in Primghar, Iowa (A. 109). On or about September 13, 1969, an Order was entered by the Iowa Board of Parole revoking his parole and ordering that he be returned to the Iowa State Penitentiary (A. 110).

As in the case of Petitioner Morrissey, Booher was not, at any time during any of the proceedings with respect to the parole revocation which caused him to be returned to the Iowa State Penitentiary, granted a hearing or other opportunity to question, challenge, or become aware of the facts which formed the basis of his alleged parole violation, nor was he granted the opportunity of presenting evidence on his own behalf nor of confronting or of cross-examining those upon whose testimony his parole was revoked.

On November 21, 1969, Booher filed, in the District Court of the State of Iowa in and for Lee County, a Petition for Writ of Habeas Corpus, alleging that his constitutional rights had been denied in that his parole had been revoked without a hearing. This Petition for Writ of Habeas Corpus was denied on November 26, 1969 (A. 96). A subsequent Petition for Writ of Habeas Corpus was filed with

the Lee County District Court on December 22, 1969, and was denied on January 6, 1970, on the grounds that it presented no grounds for relief that did not exist at the time of the filing of the first Petition for Writ of Habeas Corpus (A. 97). On February 26, 1970, a third Petition for Writ of Habeas Corpus filed in the Lee County, Iowa, District Court was likewise denied because the grounds set out therein existed at the time of his original Petition and should have been presented at that time (A. 98).

On March 11, 1970, the Petitioner filed in the United States District Court for the Southern District of Iowa a Petition for Writ of Habeas Corpus (A. 78-85), which Petition was denied on June 10, 1970 (A. 113-14). On June 16, 1970, Booher filed in the United States District Court for the Southern District of Iowa an Application for Certificate of Probable Cause (A. 115), which was denied by said Court on June 16, 1970 (A. 116-17).

On July 23, 1970, the United States Court of Appeals for the Eighth Circuit granted Booher's Application for Certificate of Probable Cause, ordered that said appeal be docketed and consolidated with Cause No. 20328 (*Morrissey v. Brewer*), appointed counsel to represent Booher and ordered that appointed counsel prepare a joint brief in Causes Nos. 20328 and 20425 (A. 118).

The denial of this Petitioner's Petition for Writ of Habeas Corpus by the District Court was affirmed by 4-3 Opinion of the Court of Appeals *en banc*, the Opinion and Judgment affirming the Order of the District Court being filed on April 21, 1971 (A. 119-54, 156). A subsequent Petition for Rehearing filed by the Petitioner Booher *pro se* was denied on June 7, 1971 (A. 161).

SUMMARY OF ARGUMENT

The paroles of the Petitioners herein were granted and revoked by the Iowa Board of Parole pursuant to Iowa statutory law which does not require a hearing prior to

revocation of parole. Notwithstanding that this Court has stated in *Escoe v. Zerbst* that probation is an act of grace, more recent decisions of this Court, including *Goldberg v. Kelly*, established that once a "privilege" is granted by a state that said privilege may not be terminated or revoked without a hearing if the interest of the individual in maintaining his privileged status outweighs the state's interest in summary adjudication. A weighing of the interests involved in the parole revocation situation reveals that the parolee's interest in continued conditional liberty outweighs the state's interest in summary adjudication and that a hearing is, therefore, required prior to revocation of parole.

In addition, this Court's holding in *Mempa v. Rhay*, stating that a probationer has right to counsel at a revocation of probation hearing, impliedly requires that a hearing be held prior to revocation of parole. Further, the "contract theory" and "constructive custody" theories, which have been relied upon by various courts to justify the view that a hearing is not required prior to revocation of parole or probation, are not logically sound in theory of fact and do not provide a sufficient legal basis for holding that such a hearing is not required.

Finally, due process requires that a hearing be held prior to revocation of parole and that the parolee receive adequate notice of such hearing, that the parolee be given an opportunity to appear at such hearing, an opportunity to confront and cross-examine adverse witnesses, and an opportunity to present evidence in his own behalf.

ARGUMENT

Sections 247.5 and 247.9, Code of Iowa (1971), provide in part as follows:

247.5. *Power to parole after commitment—detainers.*
The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an

inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be a sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole.

247.9. Legal custody of paroled prisoners. All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled.

The paroles of both Morrissey and Booher, the Petitioners herein, were granted and revoked by the Iowa Board of Parole pursuant to the authority of the statutory sections quoted above. Petitioners believe that such revocations of their paroles resulted in an unconstitutional denial of due process guaranteed to the Petitioners by the Fourteenth Amendment, when such revocations were accomplished without a prior hearing at which Petitioners were afforded the opportunity to confront and cross-examine the witnesses upon whose testimony the revocations were based, and without the opportunity to present evidence on their own behalf.

The statutory language quoted above does not require any notice or hearing to the parolee upon revocation of his parole. The Iowa Supreme Court, the United States District Court for the Southern District of Iowa and the United States Court of Appeals for the Eighth Circuit have each held that the due process clause of the Fourteenth Amendment does not require any notice or hearing upon revocation of parole by the Iowa Board of Parole. *Morrissey v. Brewer*, 443 F.2d 442 (8th Cir. 1971) (A. 119-54); *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965); *Gardels v. Brewer*, 190 N.W.2d 803 (Iowa 1971); *Curtis v. Bennett*, 131 N.W.2d

1 (Iowa 1964); see also the unreported Orders of the District Court below (A. 70-71, 113-14). Petitioners submit, however, that these decisions are inconsistent with and contrary to the logic and holdings in the recent decisions of this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mempa v. Rhay*, 389 U.S. 128 (1967).

While this Court has never ruled on the precise question presented by these cases, other Federal Courts have held that the due process clause does require a hearing and an opportunity to be heard prior to revocation of parole. *Bearden v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971); *Murray v. Page*, 429 F.2d 1359 (10th Cir. 1970); *Goolsby v. Gagnon*, 322 F. Supp. 460 (E.D. Wis. 1971), or that due process requires a hearing and an opportunity to be heard prior to revocation of probation, *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970). In addition, highly persuasive dissents supporting the Petitioners' position herein have been written in connection with cases in which the majority opinion holds that due process does not require such a hearing. See Lay, J., dissenting in *Morrissey v. Brewer*, 443 F.2d 942, 952-65 (A. 134-54), and Celebreeze, J., dissenting in *Rose v. Haskins*, 388 F.2d 91, 97-105 (6th Cir. 1968). Petitioners submit that the logic and reasoning in *Bearden v. South Carolina*, *Murray v. Page* and *Hahn v. Burke* and in the dissents of Judges Lay and Celebreeze in *Morrissey v. Brewer* and *Rose v. Haskins* are more accurate, sound and persuasive than that in the majority opinions in *Morrissey v. Brewer* and *Rose v. Haskins*, and more consistent with the holdings of this Court in *Goldberg v. Kelly* and *Mempa v. Rhay*. Petitioners believe, therefore, that this Court should hold that the due process clause of the Fourteenth Amendment required a hearing and an opportunity to be heard prior to the revocation of the paroles of the Petitioners herein.

I. DUE PROCESS APPLIES TO REVOCATION OF PAROLE HEARINGS, NOTWITHSTANDING THE FACT THAT PAROLE MAY BE CONSIDERED A "PRIVILEGE" AND NOT A "RIGHT".

Nearly all of the cases which have held that due process does not require a hearing prior to revocation of probation or parole have relied, at least in part, upon the decision of this Court thirty-seven years ago in *Escoe v. Zerbst*, 295 U.S. 490, (1935). In that case, the Petitioner had been arrested for violation of his federal probation and returned directly to prison without a hearing. This Court held that the failure to take the Petitioner before the Court, as required by statute, rendered the revocation procedure defective. Although the decision in *Escoe v. Zerbst* was clearly based on a failure to comply with the applicable statute, Justice Cordozo writing for the Court continued by stating:

In thus holding we do not accept the Petitioner's contention that the privilege has a basis in the Constitution apart from any statute. Probation or the suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. 295 U.S. at 492-93.

Subsequent to this dictum by Justice Cordozo various state and lower federal courts have held that since probation and parole are matters of grace, i.e. "privileges" and not "rights," notice and hearing are not constitutionally required in connection with the revocation of such "privileges." However, as pointed out by the Seventh Circuit in *Hahn v. Burke, supra*, and the Second Circuit in *Bey v. Connecticut*, 443 F.2d 1079 (2nd Cir. 1971), it is no longer tenable, particularly in view of more recent statements of this Court in *Goldberg v. Kelly, supra*; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 423 (1951), *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), *Greene v. McElroy*, 360 U.S. 474 (1959), and *Hannah v. Larche*, 363 U.S. 420 (1960), to rely unanalytically on the

dictum in *Escoe v. Zerbst* as authority for the proposition that since probation or parole are in the first instance privileges, and not rights, that they may be coupled with such conditions in respect to their duration as the legislature may prescribe, including the revocation thereof without notice or hearing.

In holding in *Hahn v. Burke* that "fundamental constitutional requirements of due process necessitate a limited hearing prior to a probation revocation" the Seventh Circuit stated that:

While we are mindful that probation is a privilege and not a right and is subject to the conditions of the court, see *Escoe v. Zerbst*, 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566 (1935), essential procedural due process no longer turns on the distinction between a privilege and a right. See *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (May 23, 1970); *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956). See also, *Von Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1967-8), 430 F.2d at 103.

This Court held in *Goldberg v. Kelly* that the termination by a state of public assistance payments to a particular recipient without a *prior* evidentiary hearing denies the recipient procedural due process in violation of the due process clause of the Fourteenth Amendment. In arriving at its decision in *Goldberg v. Kelly*, this Court stated:

Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 22 L. Ed. 2d 600, 611, 89 S. Ct. 1322 (1969). Relevant constitutional restraints apply as much to

the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963); or to denial of a tax exemption, *Speiser v. Randall*, 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958); or to discharge from public employment, *Slochower v. Board of Higher Education*, 350 U.S. 551, 100 L. Ed. 692, 76 S. Ct. 637 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 95 L. Ed. 817, 852, 71 S. Ct. 624 (1951) (Frankfurter, J. concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union, v. McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 1236, 81 S. Ct. 1743 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hanauah v. Larche*, 363 U.S. 420, 440, 442, 4 L. Ed. 2d 1307, 1320, 1321, 80 S. Ct. 1502 (1960), 397 U.S. at 262-63.

Thus, it appears, even though a prisoner has no "right" to parole, that once a parole is granted, the question as to whether a state may act to revoke such parole or to terminate the status enjoyed by a parolee must be decided only after determining the "precise nature of the government function involved as well as the private interest" that may be affected by government action, and a weighing of the private interest in avoiding the consequences of such state action against the state interest in summary adjudication without notice or hearing.

II. A PAROLEE'S INTEREST IN REMAINING AT LIBERTY GREATLY OUTWEIGHS THE STATE'S INTEREST IN SUMMARY ADJUDICATION

Turning to an analysis of the nature of the private interest of the parolee and the governmental interest in summary adjudication, it cannot be persuasively argued that a parolee does not have a substantial interest in the continued opportunity to remain at liberty in society as opposed to being returned to prison and further confined therein, even though his liberty on parole is conditional and may be restricted in terms of his mobility and conduct. A parolee is free to enjoy a wholesome and full family and community life and is in fact, as a part of the rehabilitory goal of current correctional philosophy, encouraged to do so. On the other hand, a prisoner is confined to a generally unwholesome atmosphere and severely restricted in his every act and is, while incarcerated, unable to contribute to society as a whole. In addition, the revocation of a parolee's conditional liberty will undoubtedly interrupt, if not destroy, the home life, employment and reputation of the parolee, thereby eroding what efforts the parolee has made while on parole to once again become a reputable, useful and productive member of society. See *Bey v. Connecticut*, *supra* at 1086-87. The parole revocation may well also delay, if not terminate, the possible restoration to said parolee of many civil rights enjoyed by other citizens. Finally, if the procedures relating to the revocation are not fair, or do not appear to the parolee to be fair, the revocation of his parole will no doubt embitter the parolee against the society which has unfairly returned him to confinement further impeding his eventual return to society as a useful and productive member thereof.

Against these obvious and substantial interests of the parolee in continued conditional liberty while on parole must be weighed the governmental interests in summary adjudication, that is, parole revocation without a hearing of any kind. A reading of the dissenting opinions in *Morrissey*

v. Brewer and Rose v. Haskins, as well as a review of *Sklar, Law and Practice in Probation and Parole Revocation Hearings*, 55 J. Crim. Law 175, 194-96 (1966), reveals that those opposed to a hearing prior to parole revocation have urged that the governmental interest in summary parole revocation without notice or hearing is supported by the following adverse results that will allegedly follow the requirement of a hearing prior to revocation:

- 1) The full panoply of criminal rights will unduly overburden the administrative hearing process, bogging the parole board down in needless procedure;
- 2) Parole boards, knowing of the increased burden of revocation hearings, would become unduly conservative in granting paroles, thereby deterring the goal of rehabilitation served by the granting of paroles whenever possible;
- 3) The requirement of hearings would interfere with the *parens patriae* relationship between boards of parole and parolees, thereby deterring the rehabilitative ideal of parole;
- 4) There would be an increased burden on parole officers due to the requirement that they appear and testify, thereby reducing their effectiveness in supervisory duties;
- 5) Informants and others with information regarding parole violations would be reluctant to come forward for fear of being discovered or for fear of being cross-examined, thereby reducing the effectiveness of such informants;
- 6) There would be increased costs to government;
- 7) Any hearing would interfere with the exercise of the correctional expertise and discretion of parole boards.

Upon examination, it appears that the substance of these "governmental interests" is that the result of a required hearing will be to either (1) cause the boards of parole or

parole officers to become less efficient or less likely to perform their functions or (2) inhibit or deter rehabilitation. Petitioners submit that upon analysis these feared results are not supported by either logic or experience.

With respect to the argument that hearings will overburden the board of parole, it is necessary to examine the purpose of such a hearing. Since parole is a conditional liberty and a parolee is either expressly or impliedly assured upon the granting of his parole that he will be permitted to remain at liberty so long as he does not violate the conditions of his parole. The most basic and fundamental concept of fairness dictates that a parolee should be entitled to rely on the promise that he can remain at liberty so long as he does not violate any of the conditions of his parole. It follows that the initial determination prior to revocation is that the parolee has *in fact* violated the conditions of his parole. After a violation is established, the board must then call upon its expertise, knowledge and discretion to determine the proper action to take with respect to revocation. In those cases where a violation of parole conditions is established by either a voluntary admission by the parolee or by conviction of the parolee of a separate criminal offense, a lengthy or involved fact-finding hearing would not seem to be necessary. Therefore, a hearing would seem to impose an increased burden upon the board only in those cases in which the parolee denied the violation of the conditions of his parole. In this respect, the thirty-five year experience in the State of Michigan, where parolees are entitled by statute to a hearing (even though this hearing is not required until after his return to the correctional institution) indicates that "[t]ypically, five or six such hearings are held each year. The largest number of hearings held in a single year has been ten." *Dawson, Sentencing, The Decision as to Type, Length, and Conditions of Sentence, Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States*, p. 355 (1969). Thus, if the experience in Michigan is typical, the overall burden upon the boards of

parole in terms of the number of such hearings and the increased cost incident thereto, is not substantial. In any event, it does not seem that any burden imposed upon the board of parole by a requirement that some type of prior hearing be held to establish the fact of parole violation, or the increased cost incident to such a hearing, could justify the denial to a parolee of a hearing to which he would otherwise be entitled.

Further, in respect to the burden of such a hearing, it is not urged that the full panoply of rights applicable in the case of a criminal trial be applied to a parole revocation hearing. Petitioners urge only that a fact-finding hearing be held to determine the *fact* of parole violation. If due process requires a hearing to establish violation of parole, the extent of the hearing need only be that which is appropriate and necessary under the circumstances. Such a hearing relating to the fact of parole violation need not interfere with the subsequent decision of the board of parole regarding the appropriate disposition to be made once the violation is established. After a violation is clearly established there would appear to be no injustice in taking the matter of disposition under advisement with the board of parole then being free to consider the proper disposition without interruption or interference. Also, in cases in which the fact of violation was sufficiently established, by voluntary admission of violation or by conviction of a separate offense, so as to reduce the necessity for or extent of a fact-finding hearing, there would certainly be little or no interference with the decision regarding disposition.

The argument that a hearing would deter the rehabilitary process by causing boards of parole to grant fewer paroles "casts unwarranted aspersions on the dedication of parole boards . . . [and] assumes that parole board members would react vindictively to spite the legal process . . . [and] it assumes that parole boards would deny paroles to otherwise deserving prisoners and thereby delay their optimum rehabilitation merely to save themselves a little time." *Morrissey*

v. *Brewer*, *supra* at 959 (A. 145) (Lay, dissenting). In addition, the weight of this argument is severely lessened if the number of such hearings is small, as indicated by the Michigan experience, and, finally, there is evidence that the requirement of a hearing does not in fact produce this undesirable result. *Sklar*, *supra* at 194 N. 157. The weight of the related argument that required hearings will interfere with the *parens patriae* relationship between the parolee and the board of parole has been considerably diminished by this Court's decision in *In Re Gault*, 387 U.S. 1 (1967). Even though there may be such a relationship or something similar thereto, it is obvious, in the situation in which the parolee denies that he has committed the alleged acts which would constitute a violation of his parole, that no "identity of interests" exists between the parolee, and the board of parole so long as the fact of violation remains unestablished. It is at this precise point—when the fact of violation has not been established—that a hearing is most critical to the parolee, and, therefore, the *parens patriae* argument seems particularly inappropriate in this situation.

The argument that hearings would require the time of parole officers in testifying at such hearings is also diminished by the evidence indicating the number of hearings would not be great. In addition, the effect of knowledge on the part of a parole officer that the evidence regarding violation will be scrutinized, rather than taken at full face value, will probably have the desirable result, that officers will be more careful, if not more conscientious, in gathering and presenting evidence of violation to the board of parole. Likewise, the argument that informants would be less likely to come forward knowing that they may be required to appear at a hearing is clearly outweighed by the danger that the information received from an informant not subject to cross-examination may be misguided, faulty, biased or flatly false, and yet, if not contradicted or satisfactorily explained by the evidence or testimony of the parolee, form the basis for revocation. If the information supplied by the informant can be verified by other sources, the informant need

not necessarily be required to appear at a hearing anyway.

After considering the nature of the parolee's interest in continued liberty and the nature of the governmental interest in summary adjudication, Petitioners submit that the interest of the parolee greatly outweighs the burden which would in fact be placed upon the state and that, under the test enunciated by this Court in *Goldberg v. Kelly* and the cases cited therein, the due process clause of the Fourteenth Amendment requires an evidentiary hearing of some type prior to revocation of parole to allow Petitioners to be confronted with his parole violation and to be heard. Indeed, since the purpose of such a hearing as contemplated by Petitioners would be to insure that a parolee's conditional liberty not be revoked in the absence of sufficient evidence that the conditions of parole had in fact been violated, any concept of essential fairness would seem to require such a hearing to insure against revocation based upon half-truths, faulty, biased or false information or facts which the parolee may be able to satisfactorily explain if given the opportunity.

III. REVOCATION OF PAROLE IS A "CRITICAL STAGE" IN CRIMINAL PROCEEDINGS AND THE REQUIREMENTS OF DUE PROCESS ARE APPLICABLE THERETO

In addition to the position of Petitioners that a balancing of the interests of the parolee and state in the parole revocation context forces the conclusion that procedural due process requires a hearing prior to revocation of parole, Petitioners believe an analysis of this Court's holding in *Mempa v. Rhay* further requires a hearing prior to revocation of parole.

Mempa was convicted on his plea of guilty of the offense of "joy riding" and was placed on probation for two years on the condition that he first spend thirty days in the county jail, and the imposition of sentence was deferred. Subsequently, his probation was revoked pursuant to the

Washington law and at a hearing he was then sentenced to confinement in the penitentiary. At the hearing at which time his probation was revoked and sentence imposed, Mempa was not provided with counsel. In argument before this Court, there was some dispute between Mempa and the state as to whether the hearing at which his probation was revoked and sentence imposed was, in fact, a hearing upon revocation of probation or merely a sentencing and, therefore, a part of the original criminal proceedings. In holding "that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," this Court stated:

All we decide here is that a lawyer must be afforded at this proceeding, *whether it be labeled a revocation of probation or a deferred sentencing*. [Emphasis added.] 389 U.S. at 137.

Thus, this Court held that regardless of whether the hearing was a revocation of probation hearing or a deferred sentencing, the constitutional rights of Mempa applied to said hearing.

Subsequent to the decision in *Mempa*, there has been considerable disagreement of opinion among the various courts as to the effect of this Court's opinion. Some courts, including the District Court in these cases, have stated that the holding in *Mempa* is limited to hearings regarding the imposition of sentence and thus, is merely an extension of the right to counsel at a critical stage of the criminal proceedings. *Bearden v. South Carolina*, *supra*; *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968); *Rose v. Haskins*, *supra*; *Morrissey v. Brewer*, unreported opinion of the District Court below (A. 71); *Booher v. Lee and O'Brien Counties, et al.*, unreported opinion of the District Court below (A. 113-14).

On the other hand, some courts have held that the effect of this Court's decision in *Mempa* is that counsel is required at all proceedings where substantial rights of the criminal accused may be affected, including hearings relating to revo-

cation of probation or parole where sentence has previously been imposed. *Ashworth v. United States*, 391 F.2d 245 (6th Cir. 1968); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969). See also, *Bearden v. South Carolina*, *supra* at 1096-98 (dissenting opinion). The Court in *Hewett v. North Carolina* stated in this respect that:

The principle which undergirds that decision [*Mempa*] is broad indeed, "appointment of counsel for an indigent is required at *every stage* of a criminal proceeding where *substantial rights* of a criminal accused may be affected." [Emphasis supplied.] 389 U.S. at 257. While the right to counsel applies to "criminal proceedings," we have little doubt that the revocation of probation is a stage of criminal proceedings. Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty. 415 F.2d at 1322.

In this same regard, Justice Rawlings of the Iowa Supreme Court, dissenting in *Cole v. Holliday*, 171 N.W.2d 603 (Iowa 1969), stated:

A fair analysis of the words "criminal proceeding" and "substantial rights" to me affords no reasonable or plausible basis upon which to conclude the holding in *Mempa* is limited to actual trial. Even though probation be characterized as "a matter of grace" it still remains, when it is revoked, the probationer's substantial rights are materially affected. 171 N.W.2d at 611 (dissenting opinion).

Petitioners submit that revocation of parole is indeed a stage of a criminal proceeding in which substantial rights are materially affected, and that, therefore, the constitutional requirements of due process apply to the manner in which the decision respecting revocation of parole is determined, just as said requirements apply at other stages of criminal proceedings. If a probationer has a right, arising from the Federal Constitution, to have counsel appointed to represent him at a probation revocation hearing, as all but the narrowest reading of *Mempa* would require, Peti-

tioners submit that the Federal Constitution certainly requires that the procedural requirements of due process also apply to revocation of probation and parole. Speaking to this point one authority has stated:

Curiously, *Mempa* makes no specific mention of the right to a hearing in a probation revocation proceeding. In order to decide if the states were required to appoint counsel, the Court first had to characterize probation revocation as a critical stage in the criminal process. The marriage of right-to-counsel and "critical stage" is largely based on the assumption that counsel has a meaningful function to perform. Presumably, that function is something more than chatting with the judge or the probationer after a revocation decision has been made. Unless counsel is afforded an opportunity to affect the course and outcome of the proceeding, it is difficult to conceive what it is he is supposed to do.

The format for an effective performance by counsel is a hearing, thus it seems plain that *Mempa's* express requirement of counsel carries with it an implied right to a fair revocation hearing. If this interpretation is correct, then *Mempa* overturned an earlier decision, *Escoe v. Zerbst*, and without the courtesy of even a footnote reference. Cohen, *The Legal Challenge to Corrections: Implications for Manpower and Training*, Joint Commission on Correctional Manpower and Training. (1969)

Petitioners believe that a balancing of the appropriate interests as set forth above and an analysis of this Court's holding in *Mempa v. Rhay* require the conclusion that revocation of parole without notice and an opportunity for a hearing constitutes a denial of due process as guaranteed to Petitioners under the due process clause of the Fourteenth Amendment. However, it is also appropriate to consider the principal arguments, in addition to the classification of parole as a mere "privilege," which have in the past been relied on as a basis for finding that due process does not require a hearing prior to revocation of parole.

IV. THE "CONTRACT THEORY" DOES NOT SUPPORT THE POSITION THAT PAROLE MAY BE REVOKED WITHOUT A HEARING

It has been urged that parole is in the nature of a contract between the parolee and the state and that the parolee, a party to such contract, cannot complain if his parole is summarily revoked without notice or an opportunity to be heard, since this was one of the conditions in the "contract." In fact, the Parole Agreement used by the Iowa Board of Parole (A. 100-01) appears to have been drafted with this theory in mind, containing in the first paragraph thereof a recital of consideration, to-wit:

I, _____ No. _____ in consideration of being placed on parole by the Board of Parole of the State of Iowa, do hereby agree (A. 100)

However, as has been accurately stated by Judges Celebreeze and Lay, dissenting in *Rose v. Haskins* and *Morrissey v. Brewer*, respectively, parole is not a contract and any comparison with contract law is unrealistic and not persuasive. A parolee does not have any bargaining power in the negotiation of the term of his parole agreement, does not enter into the parole agreement on an equal status with the state, cannot object to terms he may think unreasonable and, since the parole agreement is presented to him on a take-it or leave-it basis, has no reasonable choice but to sign the agreement regardless of its terms. *Morrissey v. Brewer*, *supra* at 962 (A. 150-51) (dissenting opinion); *Hahn v. Burke*, *supra* at 104-05; *Rose v. Haskins*, *supra* at 99-100 (dissenting opinion). Further emphasizing the fallacy of the contract theory argument, Judge Celebreeze stated in his dissent in *Rose v. Haskins* that:

[I]f the theory only means that the State in fact attached such a condition to the parolee's freedom, the question remains whether the State can attach such a condition. For if the negative pregnant that is implicit in the contract theory is true (that if the parolee had not agreed to summary revocation he would have had the right to a hearing), then that

theory has recognized that a right to a hearing is inherent in the revocation situation. Waiver of such a valuable right is not to be lightly determined, and when the "choice" of the parolee is to remain in prison or accept such a burdensome provision, the "choice" to accept parole can hardly be termed a voluntary waiver of the right to hearing. 388 F.2d at 100.

Petitioners agree that the contract theory is based on false logic and is not properly applicable in the context of parole revocation. While a parole revocation hearing which is required by due process of law may be voluntarily and knowingly waived by a parolee it is not reasonable to base a waiver of the right to a hearing upon any term of a parole agreement.

Finally, this Court has rejected the contract characterization of probation by describing it as a "favor not a contract tract." *Burns v. United States*, 287 U.S. 216 (1932).

V. THE "CONSTRUCTIVE CUSTODY THEORY" DOES NOT SUPPORT THE VIEW THAT PAROLE MAY BE REVOKED WITHOUT A HEARING

It has further been urged in support of decisions holding that there is no right to a hearing prior to parole revocation that a parolee is, while on parole, still in the constructive custody of the prison authorities, even though not in physical custody. The majority in *Rose v. Haskins* followed the reasoning of the Ohio Supreme Court and compared the status of a parolee to that of a prison "trustee" stating that "a 'trustee' certainly cannot complain that his constitutional rights have been violated if his privileges are withdrawn." *Rose v. Haskins*, *supra* at 95. Apparently the court wishes that we conclude that neither trustys nor parolees have constitutional rights and that, as in the case of a trustee, a parolee cannot complain that his constitutional rights are violated if his parole is revoked.

In the first instance the constructive custody theory as espoused in *Rose v. Haskins* is suspect by attempting to equate the termination of "trusty" privileges with the revocation of parole. It goes almost without saying that the type of liberty enjoyed by a parolee, even though limited and conditional, is vastly different than that of a prison "trusty." It follows that a balancing of the parolee's interest in continued conditional liberty would greatly outweigh a "trusty's" interest in his continued status as such. Consequently, a different conclusion may well result from a weighing of a parolee's interest in continued conditional liberty against the government's interest in summary parole revocation than would result from a weighing of the "trusty's" interests against the government's interest in summary termination of that status. In addition, recent opinions have stated that all prisoners, whether trustys or not, are entitled to certain minimum procedural safeguards. *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971); *Clutchette v. Procunier*, 328 F. Supp. 767, 779-85 (N.D. Cal. 1971). In this respect the court in *Sostre v. McGinnis* stated:

If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, see *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), and afforded a reasonable opportunity to explain his actions. 442 F.2d at 198.

Finally, with respect to the constructive custody argument it would seem, if a parolee is, in fact, in the constructive custody of prison authorities while on parole, that time served in such constructive custody should logically apply

to the service of the parolee's sentence. However, Section 247.12, Code of Iowa (1971), provides:

247.12. Parole time not counted. The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole is revoked.

In fact, it affirmatively appears in the record with respect to Petitioner Morrissey in the District Court below that upon his return to prison after parole revocation his discharge date was changed from August 6, 1970, to January 20, 1971 (A. 41). Therefore, it appears that the State of Iowa, while apparently relying at least in part on the constructive custody theory to support its position herein, does not give a parolee credit for the time he serves in such "constructive custody."

VI. DUE PROCESS REQUIRES NOTICE OF A HEARING, AN OPPORTUNITY TO BE HEARD, AN OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE WITNESSES, AND AN OPPORTUNITY FOR THE PAROLEE TO PRESENT EVIDENCE ON HIS OWN BEHALF

Petitioners submit that the preceding argument has shown that the due process clause of the Fourteenth Amendment requires some type of evidentiary hearing prior to revocation of parole, and that the theories relied upon in the past to deny such a hearing are legally insufficient and not supported by logic or reason. It is at this point appropriate to consider more precisely the type of hearing which Petitioners feel would satisfy the requirements of due process in this context. In this respect, we must keep in mind that the function of a hearing is twofold. First, unless the violation of parole is established by the conviction of another separate crime while on parole, or is voluntarily admitted by the parolee, the initial function of a hearing is to establish the *fact* of parole violation. If this fact is not established, the matter should be considered terminated and the parolee permitted to remain on parole. If the fact of viola-

tion is established the board of parole may then proceed to a determination of the proper disposition of the case. Petitioners in this case are primarily concerned with the initial, or fact-finding portion of the hearing since the latter decision regarding disposition is more appropriately within the discretion and expertise of the board of parole. What Petitioners fear is that the board of parole may proceed with this latter phase of the revocation process without first having established the fact of violation. With respect to this initial part of the hearing, Petitioners believe that essential procedural process requires notice and an opportunity to be heard, including the opportunity to confront and cross-examine adverse witnesses and to present evidence on his own behalf.

•• This Court has recently stated in *Goldberg v. Kelly* that:

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L. Ed. 1363, 1369, 34 S. Ct. 779 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed termination as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. 397 U.S. at 267-69.

Even though the language quoted above relates to the context of termination of welfare payments, it would seem that the requirements of due process should apply equally

as well in the context of parole revocation in which the parolee faces a "grievous loss" at least as great as that faced by the welfare recipient in the termination of payments situation. Petitioners submit, therefore, that a hearing prior to revocation must include *at least*: (1) adequate notice, (2) an opportunity to appear, (3) an opportunity to confront and cross-examine adverse witnesses and (4) an opportunity for the parolee to present his own witnesses or other evidence.

While this Court in *Goldberg v. Kelly* further states that:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. *Powell v. Alabama*, 287 U.S. 45, 68-69, 77 L. Ed. 158, 170, 53 S. Ct. 55 (1932), 397 U.S. at 270,

the question of right to counsel is not precisely before this Court in these cases. Petitioners believe, however, that counsel would be an important part of any revocation hearing, and that this Court's holding in *Mempa v. Rhay* requires the appointment of counsel in parole revocation cases.

CONCLUSION

Based upon all of the foregoing, Petitioners submit that the due process clause of the Fourteenth Amendment requires a hearing prior to revocation of parole. Therefore, Petitioners believe, since their paroles were revoked without a prior hearing, that said revocations were legally defective and should be held to be void. The said revocations should, therefore, be stricken from the records of these Petitioners.

Respectfully submitted,

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Date — February 23, 1972

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and G. DONALD BOOHER;

Petitioners,

—v.—

LOU V. BREWER, Warden,

Respondent.

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
*AMICUS CURIAE***

MELVIN L. WULF
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INDEX

PAGE

| | |
|--|----|
| Interest of <i>Amicus</i> | 1 |
| The Question Presented | 2 |
| I. Introduction | 2 |
| II. The seriousness of the loss of a man's freedom, fundamental concepts of fairness, and basic penological goals of rehabilitation all require the application of due process before the revocation of probation and parole | 4 |
| III. The traditional justifications for denying due process at the revocation of probation or parole are neither logically nor legally sound | 10 |
| A. The Conditional Liberty Enjoyed by a Person on Parole or Probation Is Not a Matter of "Grace" Which Can Be Revoked at the Whim of the State | 10 |
| B. Due Process Guarantees Apply to the Revocation of Probation and Parole Even if the Probationer or Parolee Is Considered in Some Sense Still to Be "in Custody" Although Released From Prison | 13 |
| IV. Due process requires a hearing upon revocation of probation or parole | 17 |
| A. The Grounds for Finding a Violation of the Conditions of Probation or Parole | 17 |
| B. The Requisites of a Hearing | 18 |

| | PAGE |
|---|------|
| CONCLUSION | 23 |
| APPENDIX A—Hearing Required for Parole Revocation by State | 25 |
| APPENDIX B—Arluke, <i>A Summary of Parole Rules</i> , 15 Crime and Delinquency 267, 272-273 (1969) | 33 |

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| | |
|--|----------|
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| Arciniega v. Freeman, 404 U.S. 4 (1971) | 18, 22 |
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| | PAGE |
|---|------------------------------|
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| Oliver, In re, 333 U.S. 257 (1948) | 19 |

| | |
|---|--------------------|
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| | |
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| | |
|----------------------------|---------|
| United States Constitution | |
| First Amendment | 16 |
| Sixth Amendment | 20 |
| Fourteenth Amendment | 1, 2, 4 |

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|---|---|

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and G. DONALD BOOHER,

Petitioners,

—v.—

LOU V. BREWER, Warden,

Respondent.

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

Interest of Amicus*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 170,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-one year existence the ACLU has been particularly concerned with the fundamental guarantees of due process of law under the Fourteenth Amendment. In the past several years, the ACLU has also become involved in prisoners' rights cases and with bringing the protections of due process of law to the prisons. More recently, a National Prisoners' Rights Project has been instituted by the ACLU to increase our commitment to this area of crucial national concern. Based

* Letters of consent from the State of Iowa and from counsel for Petitioners have been filed with the clerk of the Court.

on our experience, we feel this case is a vitally important one, and believe that our brief will be of substantial assistance to the Court.

The Question Presented

Whether revocation of parole or probation¹ without notice of charges or a hearing violates the Fourteenth Amendment of the United States Constitution by depriving a person of liberty without due process of law.

I.

Introduction.

The two petitioners in this case were granted parole by the state of Iowa. Subsequently, each was arrested as a parole violator and returned to prison. Neither was given any notice of the reasons for revocation of their parole

¹ Throughout this brief, arguments will be made which apply to the revocation of both probation and parole, since "the central fact, which applies to both probation and parole revocations, is that revocation is the event which operates to deprive a man of his liberty." *Goolsby v. Gagnon*, 322 F. Supp. 460, 463 (E.D. Wis. 1971). This proposition is widely accepted. See *Bearden v. State of South Carolina*, 443 F.2d 1090, 1097-98 (4th Cir. 1971) (*en laque*) (Winter, J.; concurring in part and dissenting in part); *United States ex rel. Boy v. Connecticut State Board of Parole*, 443 F.2d 1079, 1087 (2d Cir. 1971); *Morrissey v. Brewer*, 443 F.2d 942, 959-960 (8th Cir. 1971) (Lay, J., dissenting); *Rose v. Haskins*, 388 F.2d 94, 98, 103 (6th Cir. 1968) (Celebrezze, J., dissenting); *United States ex rel. Caroscia v. Meisner*, 331 F. Supp. 635, 647 (N.D. Ill. 1971); *People ex rel. Menichino v. Warden*, 27 N.Y.2d 376, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449 (1971); *Warren v. Michigan Parole Board*, 23 Mich. App. 754, 179 N.W.2d 664, 670 n. 22 (Ct. App. 1970), *appeal dismissed*, 384 Mich. 812, 184 N.W.2d 457 (1971); Comment, *Due Process and Revocation of Conditional Liberty*, 12 Wayne L. Rev. 638 (1966); S. Rubin, *Due Process Is Required in Parole Revocation Proceedings*, June *Federal Probation* 42, 45 (1963).

or an opportunity to contest or respond to the charges. No hearing was held, no witnesses were called to testify against petitioners, no opportunity to summon witnesses was afforded them. No counsel was allowed to assist petitioners, no findings were made regarding the alleged violations.² In short, each man was snatched off the streets and summarily returned to prison.³

Petitioners in this case each had parole revoked for technical violations involving disputed issues of fact. Petitioner Booher was re-imprisoned because it was alleged that he left the territorial limits of O'Brien County without permission, and obtained a driver's license under an assumed name after his own was revoked. Petitioner Morrissey was re-imprisoned on charges that he purchased an automobile under an assumed name, drove a car without permission, and purchased furniture under an assumed name to obtain credit. Both men, when they finally learned why they had been re-imprisoned, denied the truth of the charges against them. They have spent the last three years in prison on the basis of unproven allegations which they wish, but have never been allowed, to challenge.

The issue presented by this case is a relatively simple one: is the Due Process Clause of the Constitution violated by imprisoning a man for a long period of time on another

² See *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), cert. denied, 380 U.S. 958 (1965), holding that Iowa law does not require a hearing upon the revocation of parole.

³ "... the probationer may be 'revoked' at an *ex parte* proceeding and learn about the revocation only while in the sheriff's van on the way to prison. If he is told why he was revoked, he may have to be satisfied with the answer that the judge did not feel that he was making a satisfactory adjustment." F. Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Memphis*, 47 Tex. L. Rev. 1 (1969).

man's unsubstantiated allegations that he has violated a condition of his parole?

The language of the Fourteenth Amendment is clear—a man cannot be deprived of his liberty without due process of law. Before a man can be sent to prison, our most fundamental notions of fairness require at the very least that he be informed of the charges upon which he is being imprisoned and that he be afforded the opportunity to respond to them. Because this opportunity was denied petitioners, they have been unconstitutionally imprisoned.

II.

The seriousness of the loss of a man's freedom, fundamental concepts of fairness, and basic penological goals of rehabilitation all require the application of due process before the revocation of probation and parole.

An overwhelming number of State and Federal courts, relying primarily upon *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mempa v. Rhay*, 389 U.S. 128 (1967),⁴ have come to recognize that the deprivation of freedom suffered by a person whose probation or parole is revoked is such

⁴ *Mempa* has been used primarily to support the proposition that due process requires the assistance of counsel at probation and parole revocation hearings. See e.g., *Gunsolus v. Gagnon*, 10 Cr. L. 2282 (7th Cir. Dec. 28, 1971); *United States ex rel. Bey v. Connecticut State Board of Parole*, *supra*, n. 1; *Hewitt v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969); *Ashworth v. United States*, 391 F.2d 245 (6th Cir. 1968) (*per curiam*); *Goolsby v. Gagnon*, *supra*, n. 1; *Scarpelli v. Gagnon*, 317 F. Supp. 72 (E.D. Wis. 1970); *People ex rel. Menichino v. Warden*, *supra*, n. 1; *Warren v. Michigan Parole Board*, *supra*, n. 1; *Commonwealth v. Tinson*, 433 Pa. 328, 249 A.2d 549 (1969); *Gargan v. State*, 217 So.2d 578 (Ct. App. Fla. 1969); *State v. Seymour*, 98 N.J. Super. 526, 237 A.2d 900 (1968).

a grievous loss that due process standards must be applied to the proceedings.⁵

As the Tenth Circuit Court of Appeals said recently, in *Murray v. Page*, 429 F.2d 1359, 1361-62 (10th Cir. 1970):

The interest of the individual parolee is obviously very great. He has been found guilty of a crime, deemed worthy of rehabilitation and consequently given the privilege of parole. Parole revocation therefore terminates a valued, if conditional, liberty; personal freedom—whether classified as a grace, privilege or as constructive custody—has been unalterably rescinded.

* * *

Therefore while a prisoner does not have a constitutional right to parole, once paroled he cannot be deprived of his freedom by means inconsistent with due process. The minimal right of the parolee to be informed of the charges and the nature of the evidence against him and to appear and be heard at the revocation hearing is inviolate. Statutory deprivation of this right is manifestly inconsistent with due process and is unconstitutional.⁶

⁵ All but eight states afford minimum due process upon the revocation of parole. See Appendix A, which sets forth the law regarding parole revocation hearings in all states.

⁶ Accord: *Gunsolus v. Gagnon*, *supra*, n. 1 (due process requires counsel at probation revocation hearing); *Bearden v. South Carolina*, *supra*, n. 1 (hearing required for revocation of probation); *United States ex rel. Bey v. Connecticut State Board of Parole*, *supra*, n. 1 (due process requires counsel at parole revocation hearing); *Hahn v. Buske*, 430 F.2d 100 (7th Cir. 1970) (hearing required for revocation of probation); *Murphy v. Turner*, 426 F.2d 422 (10th Cir. 1970); *Alvarez v. Turner*, 422 F.2d 214 (10th Cir.

The judicial position that due process requires a hearing upon the revocation of probation or parole is supported by virtually all those who have studied the area. The Task Force on Corrections of the President's Commission on Law Enforcement and the Administration of Justice declared:

[T]he need to insure that coercive decisions vitally affecting the lives of offenders are not made through prejudice, on the basis of inadequate or incorrect information, or without rational relation to their purposes or justifications, requires significantly greater safeguards than now exist in most correctional systems. President's Commission on Law Enforcement and Administration of Justice, *Corrections* 13 (1967).

The Task Force recommended that all decisions which potentially affect conditional liberty be rendered only after a hearing:

It is inconsistent with our whole system of government to grant such uncontrolled power to any officials, particularly over the lives of persons. The fact that

1976). (minimum due process hearing required for revocation of parole); *Hewitt v. North Carolina*, *supra*, n. 4 (due process requires counsel at probation revocation hearing); *Elcner v. Hammond*, 116 F.2d 982 (6th Cir. 1941) (hearing required for revocation of conditional pardon); *United States ex rel. Caroscia v. Meisner*, *supra*, n. 1 (due process required for parole revocation hearing); *Goolsby v. Gagnon*, *supra*, n. 1 (hearing required for revocation of parole); *Klotz et al. v. Ohio Adult Parole Authority*, 330 F. Supp. 665 (N.D. Ohio 1971) (urges overruling *Rose v. Haskins*, *supra* and requiring hearing for revocation of parole); *People ex rel. Menichino v. Warden*, *supra*, n. 1 (due process requires hearing with counsel before parole revocation); *Warren v. Michigan Parole Board*, *supra*, n. 1 (due process requires counsel at parole revocation hearing); *Chase v. Page*, 456 P.2d 590 (Okla. Cr. 1969) (hearing required for revocation of parole).

a person has been convicted of a crime should not mean that he has forfeited all rights to demand that he be fairly treated by officials.

For some kinds of decisions, such as decisions to revoke probation or parole, offenders should be accorded the basic elements of due process, such as notice, representation by counsel, and opportunity to present evidence and to confront and cross examine opposing witnesses. *Id.* at 83, 84.

This view is supported by every other major study of the criminal law, corrections, and due process to discuss this issue in the last few years. The A.B.A. Project on Minimum Standards of Criminal Justice, *Standards Relating to Providing Defense Services* (Approved Draft 1968), recommends the appointment of counsel in parole revocation proceedings, clearly envisioning a hearing in every such instance. The American Law Institute's Model Penal Code provides for a hearing in every parole revocation, with the assistance of counsel. American Law Institute, *Model Penal Code*, §301.4, §305.15(1) (Proposed Official Draft 1962).

Commentators further agree not only that is a hearing on parole revocation constitutionally required, but that it is required by sound penology as well.⁸

⁸ See also, A.B.A. Project on Minimum Standards of Criminal Justice, *Standards Relating to Probation* (Approved Draft 1970); President's Commission on Law Enforcement and the Administration of Justice, *Corrections* (1967); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967).

⁹ F. Cohen, *Sentencing*, 47 Tex. L. Rev., *supra*, n. 3; W. Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. Colo. L. Rev. 197 (1970); K. Davis, *Administrative*

This overwhelming consensus as to the need for a hearing upon revocation of probation or parole demonstrates the breadth of support for the claim that failure to grant such a hearing will stifle the very rehabilitative processes which both the parole and corrections systems are intended to foster. The parolee or probationer is returned to society where he is encouraged to adopt its values and its respect for human dignity, liberty and freedom. For society to thrust him back into prison without affording even an opportunity to be heard encourages embitterment and frustration.

The parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Certainly no circumstance could further that purpose to a greater extent than a firm belief on the part of such offenders in the impartial, unhurried, objective and thorough processes of the machinery of law, and hardly any circumstance could with greater effect im-

Law Treatise, §7.16 (1958); R. Dawson, *Sentencing—The Decision as to Type, Length and Conditions of Sentence* (American Bar Foundation 1969); S. Kadish, *The Advocate and the Expert in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961); Tobriner, *Due Process Behind Prison Walls*, *The Nation*, Oct. 18, 1971; Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 Cal. L. Rev. 1215 (1971); Comment, *Parole Status and the Privilege Concept*, 1969 Duke L.J. 139; Comment, *Procedural Safeguards in Federal Parole Revocation Hearings*, 57 Nw. U.L. Rev. 737 (1963); Comment, *Due Process*, 12 Wayne L. Rev., *supra*, n. 1; Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 Yale L.J. 368 (1962); Note, *Parole Revocation Procedures*, 65 Harv. L. Rev. 309 (1951); Note, *Discretionary Revocation of Probation and Parole, The Import of Mempa v. Rhay to the Present System*, 4 U.S.F.L. Rev. 160 (1969); Note, *Re-Arrest of Parolees: Constitutional Considerations*, 46 Wash. L. Rev. 175 (1970).

⁹ See, e.g., Comment, *Observations on the Administration of Parole*, 79 Yale L.J. 698 (1970).

pede progress toward the desired end than a belief on their part that the machinery of the law is arbitrary, technical, too busy, or impervious to facts. *Fleming v. Tate*, 156 F.2d 848, 850 (D.C. Cir. 1946).

It must be recognized that "the need for fairness is as urgent in the parole process as elsewhere in the law . . ."

Monks v. New Jersey, 58 N.J. 238, 277 A.2d 193, 195 (1971).

It is fundamentally unfair to take away the freedom of probationers or parolees under conditions which encourage arbitrary actions by failing to afford even the most minimal protections of due process. "[O]ur constitutional

scheme does not contemplate that society may commit law breakers to the capricious and arbitrary actions of prison

officials." *Sostre v. McGinnis*, 442 F.2d 178, 198 (2d Cir. 1971) (*en banc*). As the Second Circuit Court of Appeals

stated in *United States ex rel. Bey v. Connecticut State Board of Parole*, *supra*, 443 F.2d at 1089:

Chief Justice Burger has recently commented on the seeming effectiveness with which "typical" prison systems in this country "brutalize and dehumanize" inmates . . . One certain way to increase a prisoner's sense of resentment and to discourage his will eventually to return to a normal life would be to deny him basic safeguards essential to the fundamental fairness of a decision to deprive him of the liberty he gained upon parole release.

Finally, it must be noted that, as demonstrated by Appendix A, all but eight of the states now hold hearings upon the revocation of probation and parole, some with a full panoply of trial-type rights including representation of counsel. It seems obvious that the administrative incon-

venience caused by requiring hearings cannot be very great if such an overwhelming number of states conduct them,¹⁰ though expenses incurred by holding such hearings could not constitutionally justify their denial. *Bell v. Busson*, 402 U.S. 433, 435 (1971).¹¹

III.

The traditional justifications for denying due process at the revocation of probation or parole are neither logically nor legally sound.

A. *The Conditional Liberty Enjoyed by a Person on Parole or Probation Is Not a Matter of "Grace" Which Can Be Revoked at the Whim of the State.*

It has traditionally been said that parole and probation are privileges bestowed as an act of grace by the State and can therefore be withdrawn at will, without the need for procedural due process. Cf. *Escöe v. Zerbst*, 295 U.S. 490 (1935). But this Court in recent years has rejected the theory that characterization of an interest as a "privilege" rather than a "right" justifies summary termination without due process of law. In *Goldberg v. Kelly*, *supra*, the Court held that welfare recipients must be given a hearing before their benefits could be terminated.

¹⁰ See also: R. Dawson, *Sentencing, A.B.A.*, *supra*, n. 8; Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493, 540-550 (1970); S. Kadish, 45 Minn. L. Rev., *supra*, n. 8; S. Rubin, *Developments in Correctional Laws, Crime and Delinquency* 185 (April 1970); R. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. Crim. L.C. & P.S. 175, 197 (1964).

¹¹ For a refutation of the traditionally advanced arguments on the detrimental impact hearings would have on the parole and probation system, see *Rose v. Haskins*, *supra*, 388 F.2d at 101-102 (Celebrezze, J., dissenting); Comment, *Due Process*, 12 Wayne L. Rev. 1, *supra*, n. 1; authorities cited, n. 10, *ante*.

The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right'" The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the government interest in summary adjudication. 397 U.S. at 262-263.

Goldberg v. Kelly is only one of a long line of Supreme Court cases which recognize that wherever freedom or security is threatened, due process protections must be accorded, whether the impending loss is characterized as a "privilege" or a "right". Thus, those facing discharge from employment, *Greene v. McElroy*, 360 U.S. 474 (1959); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), or those brought before investigating committees, *Hannah v. Larche*, 363 U.S. 420 (1960), are entitled to an adequate notice of charges and a hearing on those charges.¹²

Cases which have applied the *Goldberg* rule, which weighs the seriousness of the threatened loss against the inconvenience to the State of applying due process, have found that the loss of a variety of benefits, all of which may be said to be less significant than imprisonment, are

¹² See also, *Sostre v. McGinnis*, *supra* (due process hearing required before time credited to prisoner's sentence can be taken away or other serious punishment imposed); Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); K. Davis, *Administrative Law Treatise* §7.04 (1970 Supp.), §7.11 (1955).

sufficiently grievous to require hearings. These include garnishment of wages,¹³ loss of a driver's license,¹⁴ loss of the ability to purchase liquor,¹⁵ expulsion from school,¹⁶ expulsion from public housing,¹⁷ and termination of water.¹⁸ See also, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958).

To lose one's freedom and be returned to prison for a number of years is assuredly to "suffer a grievous loss," and the interest in avoiding that loss of freedom certainly "outweighs the governmental interest in summary adjudication," *Goldberg v. Kelly*, *supra*, 397 U.S. at 263.¹⁹

In balancing the inconvenience and cost to the state against the possible wrongful loss of an individual's freedom, for many years, the result is clear. Parole and probation revocation represent such drastic curtailments of freedom that due process standards must be applied. As the Court wrote recently in *Boddie v. Connecticut*, 401 U.S. 371, 377-378 (1971):

Early in our jurisprudence, this Court voiced the doctrine that "[w]herever one is assailed in his person

¹³ *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

¹⁴ *Bell v. Burson*, *supra*.

¹⁵ *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

¹⁶ *Sher v. Board of Education*, 424 F.2d 741 (3rd Cir. 1970).

¹⁷ *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

¹⁸ *Davis v. Weir*, 328 F. Supp. 347 (N.D. Ga. 1971).

¹⁹ Compare: *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970) (no due process required at initial application seeking grant of parole) with *United States ex rel. Bey v. Connecticut State Board of Parole*, *supra*, n. 1 (full due process including counsel required at revocation of parole).

or his property, there he may defend. The theme that 'due process of law signifies a right to be heard in one's defense' has continually recurred. . . . Although [m]any controversies have raged about the cryptic and abstract words of the Due Process Clause, . . . there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case [citations omitted].

B. Due Process Guarantees Apply to the Revocation of Probation and Parole Even if the Probationer or Parolee Is Considered in Some Sense Still to Be "in Custody" Although Released From Prison.

The other major theory which has been heavily relied upon to deny minimal due process guarantees in revocation of probation or parole equates the parolee or probationer with the prison "trustee" who, although he may be permitted outside the prison walls, "cannot complain that his constitutional rights have been violated if his privileges are withdrawn."²⁰ *Rose v. Haskins*, *supra*, 388 F.2d at 95. This theory treats revocation of parole as a matter of administering prison discipline.

The constitutional rights . . . which he claims were violated apply *prior* to conviction. They are not applicable to a convicted felon whose convictions and sen-

²⁰ A third traditional theory is that the terms of a probation or parole order constitute a contract between the sovereign and the convict in which the latter agrees to various conditions, one of which may be revocation at the will of the sovereign without hearing or notice. Any analogy to the law of contracts indicates that this "agreement" is little more than a contract of adhesion. See *Moffitt v. Brewer*, *supra*, 443 F.2d at 962-963; *Hahn v. Burke*, *supra*, 430 F.2d at 104-105; *Rose v. Haskins*, *supra*, 388 F.2d at 99-100 (Celebrezze, J., dissenting).

tences are valid and unassailable and whose sentences have not been served. *Rose v. Haskins, supra*, 388 F.2d at 95.

This theory is fallacious in two respects. First, it wrongly assumes that incarcerated persons are not entitled to the safeguards of the Constitution. But courts have held time and again that the Due Process Clause applies to prisoners.²¹ Particularly apposite are those cases which have held that a prisoner cannot be punished without minimum due process safeguards.²² As the Second Circuit stated in *Sostre v. McGinnis, supra*:

If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least

²¹ "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated." *Johnson v. Avery*, 393 U.S. 483, 486 (1969).

²² *Haines v. Kerner*, — U.S. —; 40 L.W. 4136 (Jan. 13, 1972); *Sostre v. McGinnis, supra*; *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *United States ex rel. Campbell v. Pate*, 401 F.2d 55 (7th Cir. 1968); *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966); *Urbano v. McCorkle*, — F. Supp. —, 10 Cr. L. 2201 (D.N.J., Nov. 17, 1971); *Sinclair v. Henderson*, 331 F. Supp. 1123 (E.D. La. 1971); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Gluchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Mcola v. Fitzpatrick*, 322 F. Supp. 878 (D. Mass. 1971); *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970); *Carter v. McGinnis*, 320 F. Supp. 1092 (W.D.N.Y. 1970); *Dabney v. Cunningham*, 317 F. Supp. 57 (E.D. Va. 1970); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *Morris v. Trivisono*, 310 F. Supp. 857 (D. R.I. 1970); *Rodriguez v. McGinnis*, 307 F. Supp. 627 (N.D. N.Y. 1969), *aff'd*, — F.2d — (Docket 34567, 2d Cir., Jan. 25, 1972) (*en banc*); *United States ex rel. Hancock v. Pate*, 223 F. Supp. 202 (N.D. Ill. 1963).

be premised on facts rationally determined . . . In most cases it would probably be difficult to find an inquiry fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions. 442 F.2d at 198.

Indeed, *Sostre*, in holding that due process requires a hearing before good time can be taken from a prisoner, established that due process applies to punishment affecting conditional liberty *in the future*.²³ Consequently, due process must certainly be applied to conditional liberty presently enjoyed.

Those cases which have held that a prisoner who is to be transferred from a prison to an institution for the criminally insane must be afforded complete constitutional protections, also weaken the "custody" theory. *Barstrom v. Herold*, 383 U.S. 107 (1966); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969). The rationale of these cases is that a prisoner's form of custody cannot be drastically changed without his being afforded the protections of due process.²⁴ It seems clear; therefore, that the parolee or probationer who enjoys his freedom on the streets but who is suddenly seized and re-imprisoned is necessarily entitled to equal due process safeguards. It

²³ *Sostre v. McGinnis*, *supra*; *Nolan v. Scafati*, *supra*, n. 22; *United States ex rel. Campbell v. Pate*, *supra*, n. 22; *United States ex rel. Mosher v. LaVallee*, 321 F. Supp. 127 (N.D.N.Y. 1970); *Carothers v. Follette*, *supra*, n. 22; *Rodriguez v. McGinnis*, *supra*, n. 20; *Medlock v. Burke*, 285 F. Supp. 67 (E.D. Wis. 1968); *United States ex rel. Hancock v. Pate*, *supra*, n. 22.

²⁴ See also *Williams v. Robinson*, 432 F.2d 637 (D.C. Cir. 1970); *Corington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Edwards v. Schmidt*, 321 F. Supp. 68 (W.D. Wis. 1971).

should also be noted that parolees and probationers are entitled to constitutional protections while actually on parole. See e.g., *Porth v. United States*, — F.2d —, 10 Cr. L. 2244 (10th Cir. Dec. 13, 1971); *Sobell v. Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971), both of which struck down conditions which were held to impinge on the parolees' First Amendment rights.

Secondly, the "constructive custody" theory is neither logical nor realistic. Surely the status of a man free on the streets, living with his family, holding a job, restricted only in certain areas of his life and required to report to his supervising officer weekly or monthly, is entirely different from the status of a man locked behind bars. The prisoner is isolated from family and friends, cannot earn money to support himself or his family, is subject to a multitude of rules and regulations that regiment every aspect of his life, has no privacy, no normal sexual outlets, and no control over his freedom or his life. *Morrissey v. Brewer*, *supra*, 43 F.2d at 961; n. 18 (Lay, J. dissenting); see also, Note, *Re-Arrest of Parolees, Constitutional Considerations*, 46 Wash. L. Rev., at 2.

Furthermore, if it were true that the parolee or probationer continued to be in the custody of the State much as a prisoner, one would expect that he would be entitled to receive credit against his sentence for the time he was released. This, however, is rarely the case. See, Arluke, *A Summary of Parole Rules*, 15 Crime and Delinquency 267 (1969); Note, *Parole Revocation in the Federal System*, 56 Geo. L.J. 705, 732-733 (1968).

Therefore, since a prisoner in actual custody is granted constitutional safeguards, including the right to notice and a hearing, before being punished or subjected to a transfer

which radically alters his status, those same protections must apply to the man who is only fictionally "in custody" while on probation or parole.

IV.

Due process requires a hearing upon revocation of probation or parole.

A. The Grounds for Finding a Violation of the Conditions of Probation or Parole.

The need for a hearing upon revocation of probation or parole is emphasized when one recognizes how often revocation is based upon violation of petty requirements bearing little or no relation to common concepts of anti-social behavior.

Some parole conditions are moralistic, most are impractical, others impinge on human rights, and all reflect obsolete criminological conceptions. On the whole they project a percept of a man who doesn't exist. Arluke, *op. cit. supra*, 15 Crime and Delinquency at 269.

Conditions of parole or probation which can result in revocation can include consumption of liquor, changing job or residence, marriage without permission, driving a car, indebtedness, violating a curfew, contracting a venereal disease, or leaving a prescribed location.²⁵ Revocation for violating such patently trivial conditions is common in every state, as illustrated in Appendix B.

²⁵ See Appendix B, charting frequency of common parole conditions in each state.

The violations themselves are also often subject to factual dispute. This Court has recently reversed the revocation of a man's parole for associating with other ex-convicts when the only proof of the violation consisted of the fact that the ex-convicts were employed at the same establishment where the parolee worked. *Arciniega v. Freeman*, 404 U.S. 4 (1971) (*per curiam*). In *Fleming v. Tate*, *supra*, the parolee was reimprisoned for leaving the state without permission, to attend his sister's funeral. He was not permitted to produce testimony from his parole sponsor who had given him permission to go, under the mistaken belief that he had the authority to do so. Conditional release was revoked in *Moore v. Reid*, 246 F.2d 654 (D.C. Cir. 1957), on the ground that writing letters to a former cellmate violated a parole condition forbidding association with persons having a known criminal background.²⁶

Thus, the nature of a violation can often be not only inconsequential but can turn on purely factual questions which could be readily refuted if a hearing were allowed.

B. The *Réquisites* of a Hearing.

This Court long ago emphasized that the "fundamental requisite of due process of law is the opportunity to be

²⁶ See also *United States ex rel. Boy v. Connecticut State Board of Parole*, *supra*, n. 1 (revocation based primarily on suspicions and fears about potential future misconduct); *Genet v. United States*, 375 F.2d 960 (10th Cir. 1967) (revocation for failure to find sufficient income to maintain ordered level of support payments for family); *United States v. Taylor*, 321 F.2d 339 (4th Cir. 1963) (revocation for failing to pay fine); *Goolsby v. Gagnon*, *supra*, n. 1 (revocation primarily for leaving parole supervisor's office without permission); *People ex rel. Menckino v. Warden*, *supra*, n. 1 (revocation for "consorting" with persons with criminal record and denying this alleged fact).

heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). In *Goldberg v. Kelly*, *supra*, the Court defined the minimal requisites of a hearing as

timely and adequate notice detailing the reasons for a proposed [change in status], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. 397 U.S. at 267-268.²⁷

In the revocation of probation or parole, the notice must give specific and detailed descriptions of the conduct complained of by the authorities. See *Groppi v. Leslie*, — U.S. —, 40 U.S.L.W. 4151 (Jan. 13, 1972); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J. concurring); *In re Oliver*, 333 U.S. 257, 273 (1948); *Sostre v. McGinnis*, *supra*, 442 F.2d at 203; *Escalera v. New York City Housing Authority*, *supra*.

The accused must be allowed to confront his accusers. *Goldberg v. Kelly*, *supra*; *Berger v. California*, 393 U.S. 314 (1969); *Pointer v. Texas*, 380 U.S. 400 (1965); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Greene v. McElroy*, 360 U.S. 474 (1959); Davis, §7.05 (1958), *supra*, n. 12. This is especially crucial in a parole or probation revocation situation where the facts are disputed. When a parolee or probationer is charged with a vague violation such as "conspiring,"²⁸ there are no statutory or judicial guidelines to follow and no interpretations

²⁷ See generally: W. Cohen, *Due Process*, 42 U. Colo. L. R., *supra*, n. 8; Pugh and Carver, *Due Process and Sentencing: from Mary to Memphis to McGautha*, 49 Tex. L. Rev. 25 (1970).

²⁸ See discussion, pp. 17-18, *supra*, and Appendix B.

of parole conditions to which one can turn. Parole officers may be overworked and improperly trained, and often they are insufficiently informed about a parolee's activities.²⁹ They may even display bias or animosity towards the parolee or probationer. For these reasons, it is imperative that the accuser and the accused meet face to face to allow the board to ascertain the truth.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. *Greene v. McElroy*, *supra*, 360 U.S. at 496.

In *United States ex rel. Carjoscia v. Meisner*, *supra*, n. 1, the parole board's failure to produce its sources of information or to allow the petitioners to examine reports made to the board was challenged. It was held that the board's failure to produce its sources or, in the alternative, its reports, violated the petitioners' Sixth Amendment right to confront the witnesses against them. In reaching that con-

²⁹ Task Force Report, *Corrections*, *supra* n. 7, at 6, 70, 97-99; Dawson, *Sentencing*, *supra* n. 8, at 317-338.

clusion, the court observed that although the board already provided some procedural safeguards—a hearing was held reasonably soon after the alleged violation, and reasonably near the site of the violation, and the accused could retain counsel and call voluntary witnesses—more was necessary: “due process requires an opportunity for the aggrieved person to confront and cross examine adverse witnesses.” 331 F. Supp. at 649, citing *Goldberg v. Kelly*, *supra*.

Opportunity for the presentation of witnesses on behalf of the probationer or parolee is also an important safeguard against unfair or arbitrary decisions. It allows the man the opportunity to corroborate his own version of events, to prove an alibi defense, and in general to overcome the inherent suspicion as to his veracity by reason of his incarceration. It is not contended that the probationer or parolee should have subpoena powers. Where, however, material witnesses voluntarily come forward on his behalf, there is no logical reason for excluding their sworn testimony from a hearing body seeking to learn the truth. This appears to be such a basic precept of fairness that courts often conclude, without more, that voluntary witnesses must be allowed, as the *Carioscia* court held. The Fourth Circuit Court of Appeals, in *Bearden v. South Carolina*, *supra*, n. 1, has agreed: “. . . the parolee was entitled to notice of his alleged default and opportunity to rebut the same, including the right to be heard *pro se* before someone representing the board, and to present witnesses in his own behalf,” 443 F.2d at 1095 (emphasis added).

Finally, the decision reached by the Board must be based on evidence adduced at the hearing:

. . . which the prisoner has had the opportunity to refute . . . To permit punishment to be imposed for

reasons not presented and aired would invite arbitrariness and nullify the right to notice and a hearing . . . The practice of going outside the record in search of bases for punishment must cease. *Landman v. Royster*, *supra*, 333 F. Supp. at 653-654.

See also *Goldberg v. Kelly*, *supra*, 397 U.S. at 271; *Escalera v. New York City Housing Authority*, *supra*, 425 F.2d at 862-3.

Moreover, there must be some minimum standard of proof to justify a decision. *Arciniega v. Freeman*, *supra*, *Thompson v. Louisville*, 362 U.S. 199 (1960). In *Arciniega* this Court summarily reversed a judgment of the 9th Circuit upholding the revocation of probation for violating its conditions by associating with ex-convicts who were employed at the same place as the probationer. It held that there must be "satisfactory evidence" of a violation, and that "occupational association, standing alone, [could not be] satisfactory evidence on non-business association violative of the parole restriction." This case suggests that, not only must there be "satisfactory evidence" of a violation of conditions of probation or parole, but also that such conditions must be reasonably construed.³⁹

³⁹ Dawson, *supra*, p. 367. See also, Appendix B.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Hearing Required for Parole Revocation by State

| State | I | | | |
|-------------|--|--|---|---|
| | Statute Req. Some Hearing | II Statute Does Not Req. Hearing | III Decision Req. Some Hearing | IV Decision Does Not Req. Hearing |
| Alabama | Ala. Code tit. 42, §12 (1958) | | | |
| Alaska | Alaska Stats. §33-15-220 (1962) | | | |
| Arizona | Ariz. Rev. Stats. Ann. §31-417 (1939) | | | |
| Arkansas | Ark. Stats. Ann. §43-2810 (1968) | | | |
| California | | Calif. Penal Code §3060 (1947) | | <i>In re Gomez</i> , 64 C.2d 591, 51 Cal. Rptr. 97, 414 P.2d 33 (1966) |
| Colorado | | Colo. Rev. Stats. §39-17-4 (1969) | <i>Hutchinson v. Patter- son</i> , 267 F. Supp. 433 (D. Colo. 1967) | |
| Connecticut | | Conn. Gen. Stats. §54-126 (1967) | <i>U. S. ex rel. Bey v. Conn. Bd. Parole</i> , 448 F.2d 1079 (2d Cir. 1971) | |

| State | I Statute, Req. Some Hearing | II Statute Does Not Req. Hearing | III Decision Req. Some Hearing | IV Decision Does Not Req. Hearing |
|----------|--|---|--------------------------------------|---|
| Delaware | Del. Code Ann. tit. II §4352 (1964) | | | |
| Florida | Fla. Stats. Ann. §947.23 (1) (1955) | | | |
| Georgia | Ga. Code Ann. §77-519 (1965) | | | |
| Hawaii | Hawaii Rev. Stats. §353-66 (1967) | | | |
| Idaho | Idaho Code §§20-229, 20-229A (1970) | | | |
| Illinois | Ill. Ann. Stats. ch. 108 §205 (1970) | | | |
| Indiana | Ind. Stats. Ann. §13-1611 (1961) | | | |
| Iowa | | Iowa Code Ann. §247.9 (1967) §247.28 (1924) | | <i>Morrissey v. Brewer</i> , 443-F.2d 942 (8th Cir. 1971) |
| Kansas | K.S.A. §22-3721 (1970) | | | |

Kentucky

Ky. Rev. Stats. Ann.
§§439.330(1) (e),
(1956)
439.430(1), (1966)
439.440 (1956)

Louisiana

La. Rev. Stats.
§15.574.9 (1968)

Maine

Me. Rev. Stats. Ann.
ch. 34 §1675
(1969)

Maryland

Md. Ann. Code
art. 41 §117 (1957)

Massachusetts

Ann. Laws of Mass.
ch. 127 §§148, 149
(1946)

Martin v. State Bd.
of Parole, 213 N.E.
2d 925 (Mass.,
1966), 350 Mass.
210

Michigan

Mich. Comp. Laws
Ann. §751.240(a)
(1968)

Minnesota

Minn. Stats. Ann.
§243.05 (1967)

Morrissey v. Brewer,
443 F.2d 942, 68th
Cir. 1971

Mississippi

Miss. Code Ann.
§4004.13 (1956)

| State | I Statute Req. Some Hearing | II Statute Does Not Req. Hearing | III Decision Req. Some Hearing | IV Decision Does Not Req. Hearing |
|---------------|---|--|---|---|
| Missouri | Mo. Ann. Stats. §549.265 (1967) | | | |
| Montana | Mont. Rev. Code §§94-9838, 94-9835 (1955) | | | |
| Nebraska | | Neb. Rev. Stats. §§83-1120, 83-1121 (1969) | <i>Brown v. Sigler</i> , 186 Neb. 800, 186 N.W. 2d 735 (1971) | |
| Nevada | | Nev. Rev. Stats., ch. 213.150, 213.110(1) (1969) | | att'y gen. opinion AGO 228 (6-14- 1961) 3 Ann. to Nev. Rev. Stats. 834 (1968) |
| New Hampshire | N.H. Rev. Stats. Ann. §607:46 (1939) | | | |
| New Jersey | | N.J.S.A. 30:4-123.23 (1963) | <i>State v. Holmes</i> , 109 N.J. Super. 180, 262 A.2d 725 (1970) | |
| New Mexico | N.M. Stats. Ann. §41-17-28 (1963) | | | |

New York

Cons. Laws of N. Y.
Correction Law
§212 (1970)

North Carolina

N.C. Gen. Stats.
§148-61.1 (1955)
*Beardon v. State of
So. Carolina*, 443
F.2d 1090 (4th
Cir. 1971)

North Dakota

N.D. Cent. Code
12-59-15 (1963)

Ohio

Ohio Rev. Code Ann.
§2967.15 (1965)

Oklahoma

Okl. Stats. Ann.,
tit. 57 §346 (1910)
tit. 57 §332.12
(1949)
tit. 57 §516 (1967)
Murray v. Page, 429
F.2d 1359 (10th
Cir. 1970)

Oregon

Ore. Rev. Stats.,
§§144.340-144.370
(1969)
Whalen v. Gladden,
249 Or. 12, 436
P.2d 560 (1968)

*People ex rel. Men-
chino v. Warden*,
27 N.Y.2d 376, 267
N.E.2d 238, 318
N.Y.S.2d 449
(1971)

In re Varner, 166
Ohio St. 340, 142
N.E.2d 846 (1957)

| State | I | | II | | III | | IV | |
|--------------|------------------------------|--|----------------------------------|----------------------------------|-------------------------------|--|-----------------------------------|---|
| | Statute Req. Some Hearing | Pa. Stats. Ann. tit. 61 §§ 331.21 (1951) tit. 61 §§ 331.21a (1957) | Statute Does Not Req. Hearing | R.I. Gen. Laws § 13-18 (1956) | Decision Req. Some Hearing | Beardon v. So. Caro. 443 F.2d 1090 (4th Cir. 1971) | Decision Does Not Req. Hearing | State v. Pasano, 96 R.I. 472, 194 A.2d 680 (1963) |
| Pennsylvania | | | | | | | | |
| Rhode Island | | | | | | | | |
| So. Carolina | | | | | | | | |
| So. Dakota | | | | | | | | |
| Tennessee | | | | | | | | |
| Texas | | | | | | | | |
| Utah | | | | | | | | |

Morisset v. Brewer,
443 F.2d 442 (8th
Cir. 1971)

Beal v. Turner, 22
Utah 2d 418, 454
P.2d 624 (1969)

Utah Code Ann.
§ 77-62-38 (1953)

Tenn. Code
§ 40-3619 (1955)

Texas Code of Crim.
Proc. art. 42.12 § 22
(1965)

- Vermont Vermont Stats. Ann.
tit. 28 §108F
(1968)
- Virginia Beardon v. So. Carolina, 443 F.2d 1090
(4th Cir. 1971)
- Washington Wash. Rev. Code
§§9.95.120 through
9.95.126 (1969)
- West Virginia W. Va. Code
§62-12-19 (1959)
- Wisconsin Wis. Stats. Ann.
§57.06(3) (1965)
Goolsby v. Gagnon,
322 F. Supp. 460
(E.D. Wis. 1971)
- Wyoming Wyo. Stats. §7-325
(1971), §7-326
(1947)
Murray v. Page, 429
F.2d 1359, 10th
Cir. 1971

| | Federal Parole | Alabama | Alaska | Arizona | Arkansas | California | Colorado | Connecticut | Delaware | Florida | Georgia | Hawaii | Idaho | Illinois | Indiana | Iowa | Kansas | Kentucky | Louisiana |
|---|----------------|---------|--------|---------|----------|------------|----------|-------------|----------|---------|---------|--------|-------|----------|---------|------|--------|----------|-----------|
| 1. Liquor usage | 4 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | |
| 2. Change of employment or living quarters | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| 3. Undesirable associations or correspondence | 1 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 |
| 4. Filing written reports | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 |
| 5. Approval of marriage (or of divorce*) | | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| 6. Out-of-state travel | | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| 7. First arrival report | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 |
| 8. Motor vehicle registration and license | | | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| 9. Narcotics usage | 2 | 2 | | 2 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 |
| 10. Participation in anti-narcotics program | | | | 3 | | | | | | | | | 3 | | | | | | |
| 11. Support dependents | 3 | 3 | 3 | | | | | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 |
| 12. Weapons; hunting license | 1 | 1 | | 2 | 2 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 2 | 2 | 2 | 1 | 1 | 1 | 1 |
| 13. Out-of-county or community travel (limited to specific area*) | 1 | | | 1 | 1 | | | 1 | | | | 1 | 1 | 1 | | a | 1 | 1 | 1 |
| 14. Waiver of extradition | 3 | 3 | | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 1 | 3 | 3 | 3 | | | | |
| 15. Indebtedness | 1 | | | 1 | 1 | 1 | 1 | | | 1 | 1 | | | | 1 | | | | |
| 16. Curfew | | | | | | | | | | b | c | | | | | | | | |
| 17. Civil rights; suffrage | | | | | | | | | | | | 2 | | | | | | | |
| 18. Gambling | | | 2 | | | | | | 2 | | | | | | | | | | |

| Louisiana | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
|-----------|----------|---------------|----------|-----------|-------------|----------|---------|----------|--------|---------------|------------|------------|----------|----------------|--------------|------|----------|--------|--------------|--------------|----------------|----------------|-----------|-------|------|---------|----------|------------|---------------|-----------|---------|---|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|--|
| Maine | Maryland | Massachusetts | Michigan | Minnesota | Mississippi | Missouri | Montana | Nebraska | Nevada | New Hampshire | New Jersey | New Mexico | New York | North Carolina | North Dakota | Ohio | Oklahoma | Oregon | Pennsylvania | Rhode Island | South Carolina | North Carolina | Tennessee | Texas | Utah | Vermont | Virginia | Washington | West Virginia | Wisconsin | Wyoming | | | | | | | | | | | | | | | | | | | | | |
| 2 | 2 | 2 | 2 | 2 | | | 2 | 2 | 2 | 2 | 4 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | | | | | | | | | | | | | | | | | | | | |
| 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | 1 | 1 | | 1 | | | | | | | | | | | | | | | | | | | | | | |
| 2 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 2 | | 2 | 2 | | 2 | | | | | | | | | | | | | | | | | | | | | |
| 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | | | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | | 3 | | | | | | | | | | | | | | | | | | | | | |
| 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | | | | | | | | | | | | | | | | | | | | |
| 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | | | | | | | | | | | | | | | | | | | | | |
| 3 | 3 | | 3 | 3 | | 3 | 3 | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | | 3 | | | 3 | | 3 | | 3 | | | | | | | | | | | | | | | | | | | | | | |
| 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | | | | | | | | | | | | | | | | | | | |
| 2 | 2 | 2 | 2 | | | 2 | | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | | | 2 | | | | | | | | | | | | | | | | | | | | | | | | |
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| | | | | | | | | | | | | | | | | | | | | | | | | 3 | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 3 | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | 3 | | | | | | | | | | | | | | | | | | | | | | | | | |
| 1 | 1 | 1 | 1 | | | 1 | 2 | | 1 | 1 | 2 | 2 | 1 | | 2 | 2 | 2 | 1 | 1 | 1 | 1 | 1 | 2 | 1 | 1 | 2 | 1 | 2 | 2 | 1 | 1 | | | | | | | | | | | | | | | | | | | | | |
| 1 | | 1 | 1 | 2 | 1 | | 1 | 1 | | | 1 | 1 | 1 | 1 | 1 | 1 | | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | | | | | | | | | | | | | | | | | | | | | | | | |
| 3 | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | | | | | | | | | | | | | | | | | | | | |
| 1 | 1 | 1 | 1 | | 1 | 2 | 1 | 1 | 1 | | 1 | 1 | | 1 | 1 | | 1 | | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | | | | | | | | | | | | | | | | | | | |
| 6 | | 6 | 6 | | | | | 6 | | | | | 6 | | | | | | | | | 6 | c | 6 | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | | | | | | | 2 | | | | 2 | | 2 | | 2 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
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IN THE
Supreme Court of the United States

SEPTEMBER TERM 1971

No. 71-5103

Supreme Court of the U.S.
FILED

MAR 24 1972

MICHAEL RODAN, JR., CLERK

JOHN J. MORRISSEY and
G. DONALD BOOHER,

Petitioners,

v.

LOU V. BREWER, WARDEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENTS' BRIEF

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• TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF CASES | (i) |
| OPINIONS OF THE COURTS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 2 |
| QUESTION PRESENTED | 2 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT: | 6 |
| I. Revocation of Parole Is Not a "Critical Stage" in a Criminal Proceeding | 9 |
| II. The Laws and Procedures Governing Parole Are Part of a Legislatively Created System and Involve the State's Interest in the Security, Protection and Welfare of its Citizens | 10 |
| III. The Introduction of an Adversary Proceeding into the Parole System Will Have a Detrimental Effect on the Rehabilitation Process | 14 |
| IV. The Present Parole System Is Neither Unfair Nor Arbitrary in its Operation | 16 |
| CONCLUSION | 21 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|----|
| Allen v. Perini, 424 F.2d 134 | 8 |
| Alvarez v. Turner, 422 F.2d 214 | 9 |
| Burns v. United States, 287 U.S. 216 | 10 |
| Cafeteria Workers v. McElroy, 367 U.S. 886 | 12 |
| Cole v. Holiday, Iowa, 171 N.W.2d 603 | 7 |
| Curtiss v. Bennett, 351 F.2d 931 | 8 |
| Curtiss v. Bennett, Iowa, 131 N.W. 2d 1 | 7 |

(ii)

| | |
|---|-------------------|
| Goldberg v. Kelly, 397 U.S. 254 | 5, 10, 11, 12, 18 |
| Hahn v. Burke, 430 F.2d 400 | 8 |
| Hannah v. Larche, 363 U.S. 420 | 16 |
| Hewett v. North Carolina, 415 F.2d 1316 | 8 |
| Hyser v. Reed, 318 F.2d 225 | 8, 14 |
| Mempa v. Rhay, 389 U.S. 128 | 5, 9, 10 |
| Menechino v. Oswald, 430 F.2d 403 | 11 |
| Miranda v. Arizona, 384 U.S. 436 | 9 |
| Re Gault, 387 U.S. 1 | 9 |
| Roy v. Haskins, 388 F.2d 91 | 8, 12, 19 |
| Sostre v. McGinnis, 442 F.2d 178 | 19, 20 |
| State v. Rath, Iowa, 139 N.W. 2d 468 | 7 |
| Williams v. Dunbar, 377 F.2d 505 | 8 |

Iowa Statutes:

| | |
|-------------------------------------|----------|
| Section 247.1, Code of Iowa (1971) | 16 |
| Section 247.5, Code of Iowa (1971) | 6, 7 |
| Section 247.9, Code of Iowa (1971) | 6, 7, 19 |
| Section 247.12, Code of Iowa (1971) | 18 |

Other Authorities:

| | |
|--|--------|
| Beddel, Jack H., Legal Advisor and Member of Iowa Board of Parole, Personal Interview | 15, 17 |
| Paul, George L., Chairman, Iowa Board of Parole, Personal Interview | 20 |

IN THE
Supreme Court of the United States

SEPTEMBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and
G. DONALD BOOHER,

Petitioners,

v.

LOU V. BREWER, WARDEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF

OPINIONS BELOW

The Orders of the United States District Court for the Southern District of Iowa denying the Petitioners' respective Petitions for Writ of Habeas Corpus have not been reported, but they are reproduced in the Single Appendix filed herein at pages 70-71 and 113-114.

The Opinion of the United States Court of Appeals for the Eighth Circuit, affirming the above referred to Orders of the District Court, is reported at 443 F.2d 942 (8th Cir. 1971).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioners' Brief at page 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States and of Section 247.5, 247.9 and 247.12, Code of Iowa (1971) are set forth in Petitioners' Brief at pages 2-3.

QUESTION PRESENTED

The question presented for review is whether the due process clause of the Fourteenth Amendment to the United States Constitution requires an evidentiary hearing prior to the revocation by the Iowa Board of Parole of a parole which had been granted by said State Board of Parole.

STATEMENT OF THE CASE

The case herein concerns two separate Petitions for Writ of Habeas Corpus which were denied by the United States District Court for the Southern District of Iowa on April 15, 1970, and June 10, 1970, respectively. In both cases jurisdiction in the District Court was based upon 28 U.S.C. § 2254. The denial of each petition was appealed to the United States Court of Appeals for the Eighth Circuit where the two were consolidated, heard by the Court *en banc*, and affirmed. The factual circumstances involved in each of these cases are set forth in the following paragraphs.

Petition of John J. Morrissey

On January 4, 1967, Petitioner John J. Morrissey entered a plea of guilty to a County Attorney's Information charging him with false uttering of a check. Morrissey was sentenced by the Linn County District Court in Cedar Rapids, Iowa,

to a term not exceeding seven (7) years in the Iowa State Penitentiary (A. 42-43). After serving a portion of his sentence, Morrissey was granted parole by the Iowa Board of Parole and released from the Iowa State Penitentiary on June 20, 1968 (A. 30). On or about January 24, 1969, he was arrested in Cedar Rapids, Iowa, for violation of his parole (A. 65-69). He was held in the Linn County jail on a hold order issued by his parole agent. Subsequently on January 31, 1969, an Order was entered by the Iowa Board of Parole revoking his parole and returning him to the Iowa State Penitentiary (A. 30).

On June 25, 1969, Morrissey petitioned the District Court of the State of Iowa in and for Lee County, Iowa, for a Writ of Habeas Corpus alleging his parole revocation was invalid for lack of a prior hearing and appointment of counsel. The petition was dismissed by the District Court (A. 54-58). On July 8, 1969, Morrissey filed a Petition for Writ of Habeas Corpus in the Supreme Court of Iowa. The Supreme Court of Iowa dismissed his petition July 25, 1969, stating the petition was not made to the Court or Judge most convenient to the Petitioner as required by Iowa law; and that the legality of his incarceration had been adjudged by a previous ruling on his petition by the Lee County District Court; and that if he was entitled to any relief his remedy would be to appeal the denial of his petition to the Iowa Supreme Court (A. 30).

On August 11, 1969, Morrissey filed his Notice of Appeal to the Supreme Court (A. 60). Said appeal was dismissed on September 15, 1969, on the grounds it was not filed within the time specified by Iowa law (A. 37).

On September 12, 1969, Petitioner Morrissey filed his Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Iowa (A. 3-7). This petition was denied April 15, 1970 (A. 70-71). A Notice of Appeal from said denial was filed on April 21, 1970; the same was considered by the District Court to be an Application for Certificate of Probable Cause pursuant

to 28 U.S.C. § 2253, and was denied April 21, 1970 (A. 72-72, 74).

The United States Court of Appeals for the Eighth Circuit Granted Morrissey's Application for Certificate of Probable Cause on June 3, 1970, and appointed counsel to represent him on his appeal (A. 75). Denial of Morrissey's petition by the District Court was affirmed by the Court of Appeals *en banc*, the opinion and judgment being filed April 21, 1971 (A. 119-154, 155).

Petition of G. Donald Booher

On April 29, 1968, Petitioner G. Donald Booher entered a plea of guilty to a County Attorney's Information charging him with forgery. He was sentenced by the O'Brien County District Court, Primghar, Iowa, to a term not exceeding ten (10) years in the Iowa State Penitentiary (A. 110). Subsequently, on November 14, 1968, Booher was granted a parole and released from the Iowa State Penitentiary (A. 110). On or about August 28, 1969, Booher was confined in the O'Brien County Jail for parole violation (A. 109); and on September 13, 1969, an Order was entered by the Iowa Board of Parole revoking his parole and ordering his return to the Iowa State Penitentiary (A. 110).

On November 21, 1969, Booher filed a Petition for Writ of Habeas Corpus in the District Court of the State of Iowa in and for Lee County alleging his constitutional rights had been violated in that he had not been given a hearing prior to the revocation of his parole. This petition was denied on November 26, 1969 (A. 96). Subsequently, another Petition for Writ of Habeas Corpus was filed in Lee County District Court on December 22, 1969. It was also denied, January 6, 1970, on the basis it presented no grounds for relief that did not exist at the time of the filing of the first petition (A. 97). A third petition was filed in the Lee County District Court on February 26, 1970. It was denied for the same reasons set out in the denial of the second petition (A. 98).

On March 11, 1970, Booher filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Iowa (A. 78-85); which petition was denied on June 10, 1970 (A. 113-114). On June 16, 1970, Booher filed an Application for Certificate of Probable Cause in the United States District Court for the Southern District of Iowa (A. 115), the same being denied by the Court on that date (A. 116-117).

The United States Court of Appeals for the Eighth Circuit granted Booher's Application for Certificate of Probable Cause on July 23, 1970 (A. 115). Booher's cause was consolidated with that of Morrissey and appointed counsel was ordered to prepare a joint brief (A. 118).

The denial of Booher's Petition for Writ of Habeas Corpus by the District Court was affirmed by the Court of Appeals *en banc*, the Opinion and Judgment being filed April 21, 1971 (A. 119-154, 156). A Petition for Rehearing filed by Booher *pro se* was denied on June 7, 1971 (A. 161).

SUMMARY OF ARGUMENT

The Iowa Board of Parole granted and revoked the paroles of Morrissey and Booher pursuant to statutory authority. Such statutory authority does not require a hearing prior to parole revocation.

The parole revocations in the case at bar were actions taken subsequent to final judgment and were not a critical stage of a criminal proceeding. Accordingly, this Court's holding in *Mempa v. Rhay* stating there was a right to counsel at a probation revocation does not require a hearing at a parole revocation.

The administration of the legislatively created procedures governing parole is a function of the state which involves a significant governmental interest in the protection, welfare, and security of the state's society. Thus, application of the balancing test suggested in *Goldberg v. Kelly* would not require the result requested by Petitioners in the instant situation.

There is a mutuality of purpose between the parolee and the Parole Board in that the primary interest of both is the integration of the inmate back into society. Requiring a due process hearing at the parole revocation stage would create an adversary proceeding and severely damage the Board's function in the role of *parens patriae*. Furthermore, such a hearing would provide no meaningful benefit to the parolee since the great majority of returnees admit the violations alleged.

The parole system as it presently operates provides sufficient protection against arbitrary action. The returnee is given notice of his alleged violations, and, subsequent to initial revocation but prior to final disposition of his case, he is given a hearing before the full membership of the Board of Parole. No further process is required or due.

ARGUMENT

The revocation of parole involves two separate determinations.

1. A determination as to whether or not there has, in fact, been a parole violation by the parolee.
2. A determination, based on the established parole violation, as to whether or not parole should be revoked.

The due process question presented in the case at bar pertains only to the first of these determinations: the establishment of the fact of parole violation. Once such violation has been established, it appears clear, and Petitioners do not contend otherwise, that the determination of whether or not parole is to be revoked is a matter solely within the discretion and expert judgment of the Board of Parole.

The Iowa Board of Parole granted and revoked the paroles of both Petitioner Morrissey and Petitioner Booher pursuant to the authority of Sections 247.5 and 247.9, Code of Iowa (1971) which provide in part, as follows:

247.5 *Power to parole after commitment - detainees.*

The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole"

"247.9 *Legal custody of paroled prisoners.* All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled."

In interpreting these statutes, the Iowa Supreme Court has consistently held that the granting of a parole is an act of grace of the State which confers no vested rights upon the inmate and is subject to withdrawal at the discretion of the granting authority. Cf. *Cole v. Holiday*, 171 N.W.2d 603 (Iowa 1969); *State v. Rath*, 258 Iowa 568, 139 N.W.2d 468 (1966). The Iowa Supreme Court has additionally held that the revocation of the gratuitously granted parole without a hearing prior to the revocation, in no way violates either state or federal constitutional guarantees. *Curtis v. Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964).

The United States Court of Appeals for the Eighth Circuit has previously approved the Iowa court's position on this matter stating:

"A parole is a matter of grace not a vested right. A large discretion is left to the states as to the manner and terms upon which paroles may be granted and revoked. Federal due process does

not require that a parole revocation be predicated upon notice and opportunity to be heard. (*Curtis v. Bennett*, 351 F.2d 931, 933 (8th Cir. 1965)).

In addition to the Iowa Supreme Court and the United States Court of Appeals for the Eighth Circuit, various other federal courts of appeal which have considered questions similar to that raised in the instant case, have held that the procedural protections of the due process clause are not required in revocation of parole proceedings. *Allen v. Perini*, 424 F.2d 134 (6th Cir. 1970), cert. denied, 400 U.S. 906 (1970); *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968), cert. denied, 393 U.S. 946 (1968); *Williams v. Dunbar*, 377 F.2d 505 (9th Cir. 1967), cert. denied, 389 U.S. 866 (1967); *Hyser v. Reed*, 318 F.2d 225, 238 (D.C. Cir. 1963), cert. denied sub nom. *Thompson v. United States Board of Parole*, 375 U.S. 957 (1963). Contra, *Hahn v. Burke*, 430 F.2d 100 (8th Cir. 1970), cert. denied, 402 U.S. 933 (1971); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).¹

¹ Both the *Hahn v. Burke* and *Hewett v. North Carolina* cases are distinguishable from the case at bar in that both involved revocation of probation, rather than revocation of parole. Probation involves a release by the court before sentence has commenced and is more directly covered by the rules set out in *Mempa v. Rhay* than is the present situation. In a probation situation a sentence has not been factually imposed, and the court still retains control of the individual. Thus, the court's jurisdiction has not been terminated, and the criminal proceeding is still open. Such is clearly not the case in a parole situation. Indeed, it is significant to note that the court in *Hahn* specifically commented that it was not faced with the question of the constitutional right to a hearing upon the revocation of a parole and did not purport to decide that issue.

REVOCATION OF PAROLE IS NOT A "CRITICAL STAGE" IN A CRIMINAL PROCEEDING

The instant cases do not involve the review of a previous judicial proceeding, but rather present the question of whether a state administrative body, pursuant to statutory authority, may revoke a parole it has previously granted. Petitioners do not accept this position. They rely heavily upon *Mempa v. Rhay*, 389 U.S. 128 (1967) as authority for their contention that a parole revocation is in fact a critical stage of the criminal proceeding.

In *Mempa*, the defendant, with the advice of court-appointed counsel, pleaded guilty to the crime of joy riding and was placed on probation with imposition of sentence deferred. Approximately two months later the probation authorities applied to have his probation status revoked for violation of the terms of probation. At a revocation hearing before the court, the defendant, without counsel, was found to have violated the terms of his probation. Probation was revoked and the defendant was sentenced to the maximum term, as was provided by Washington State law. The revocation procedure was affirmed by the Washington Supreme Court. On certiorari, this court reversed, holding that when sentence is pronounced after a period of deferred imposition, such sentencing is a "critical" stage of a criminal prosecution, and counsel is required at that point. *Mempa* is clearly distinguishable from the case at bar, since it, like *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Re Gault*, 387 U.S. 1 (1967), involved procedures concerning the initial incarceration of the criminal accused (*Alvarez v. Turner*, 422 F.2d 214 (10th Cir. 1970). Additionally, *Mempa* also involved a Washington statute which provided that an appeal of the case by the defendant was only available subsequent to revocation of probation. Thus, the presence of counsel at that revocation was necessary to insure full protection of the defendant's appeal rights.

In the instant case, sentencing of both Morrissey and Booher had been completed, and the criminal proceedings against them were terminated by that final judgment. The court's jurisdiction and duties ended when that judgment was entered and the execution of the sentence was solely within the authority of the state administrative body. The right of the Petitioners to be deprived of their liberty without due process of law was decided at the time of their convictions and sentencing. The grant and revocation of parole did not in any way revive or renew this right so as to allow them to demand it again. (Cf. *Burns v. United States*, 287 U.S. 216 (1932)). Thus, contrary to the situation in *Mempa*, which dealt with the final imposition of sentence, the petitioners' parole revocations were not a "critical stage" of a criminal proceeding and did not require a due process hearing.

II.

THE LAWS AND PROCEDURES GOVERNING PAROLE ARE PART OF A LEGISLATIVELY CREATED SYSTEM AND INVOLVE THE STATE'S INTEREST IN THE SECURITY, PROTECTION AND WELFARE OF ITS CITIZENS

The Petitioners apparently agree that parole is a privilege and not a right, but contend that such privilege, once granted, may not be revoked without a due process hearing. In support of their contention, Petitioners rely primarily on this Court's recent decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

In *Goldberg*, this Court considered a situation involving the termination of public assistance payments to a specific recipient without granting an evidentiary hearing, and it was determined that such action was a denial of procedural due process in violation of the Fourteenth Amendment. The Court found that welfare benefits are a matter of statutory entitlement for persons qualified to receive them, and the termination of such benefits requires an evidentiary hearing.

The test in *Goldberg* involved a consideration of the individual's interest in avoiding a loss as measured against the governmental interest in summary adjudication. The factual distinction between *Goldberg* and the case at bar is important. In *Goldberg*, the Court was faced with balancing the very subsistence of persons receiving welfare benefits against the interest of the state in insuring that only qualified parties received those benefits. It is quite evident that the taking of a person's livelihood is indeed a grave taking for which procedural due process must be applied. The subsistence of the individual citizen of the state undoubtedly outweighs the state's interest in assuring only qualified personnel are receiving welfare payments. However in the case at bar, the safety, security and welfare of the citizens of the state far outweighs the interest of the individual parolee in remaining in a position of conditional liberty pending determination of a parole violation.

The administration of the laws and procedures governing parole is an administrative function of the state, exercised pursuant to its power to supervise and discipline its prisoners. Parole, including the right to revoke same, is a part of a total legislatively created penalogical system governing the treatment of inmates. It is not a judicial function or power.² The state, through its prison and correctional authorities has a significant governmental interest in managing its own internal disciplinary affairs.³

²The decision to grant or not to grant a parole involves a great many non-legal, non-adversary considerations (*Menechino v. Oswald*, 430 F.2d 403, 407 (2d. Cir. 1970)), and such considerations seem equally applicable to the decision to revoke a parole. As the Court of Appeals stated in its decision below:

"We are persuaded that the same type of non-legal, non-adversary considerations often prevail in the parole board's determination of whether a prisoner is a 'good risk' for remaining outside the prison walls and in its decision to revoke a parole." (443 F.2d at 949).

³The broad, discretionary power of the Board of Parole to grant and revoke paroles is a legislative determination that the governmental interests involved are of greater significance than the individ-

The precise governmental interest involved is the welfare and security of society. Certainly, the interest of the individual parolee in being allowed to remain outside the prison walls is of great significance to him. However, the governmental interest which pertains to the whole of the state's society must be of greater significance than maintaining the conditional parole type liberty of one individual.⁴ This is especially true when it is realized that the individual involved is being returned to serve only the unserved portion of a sentence which was properly imposed with all the due process protections. Additionally, it should be noted that, unlike the *Goldberg* situation, Morrissey and Booher had no statutory rights, even if qualified, to be granted a parole or to be allowed to remain on parole once granted.

interest in maintaining conditional liberty. In *Rose v. Haskins* 388 F.2d 91 (6th Cir. 1968) the court considered a question similar to that presented in the case at bar and there commented:

"It may be true, as the Supreme Court of Ohio suggested, that in Ohio the legislature, in granting broad discretionary powers to the Parole Commission, has shown far more concern for the protection, welfare and security of its inhabitants than for the temporary freedom on parole of a convicted felon. We know of no reason why it cannot do so." (Id. at 94-95).

⁴It would appear that the state function involved in the case at bar is not unlike that of the Federal Government, as discussed in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 896 (1961). As stated by the court below:

"Both are charged with the management of their own internal affairs, and both have traditionally been allowed broad discretion in the handling of matters within their jurisdictions. In the *Cafeteria & Restaurant Workers Union* case the Supreme Court weighed this proprietary function of the Government with the private interest of an employee who was summarily excluded from the premises of a military installation for failure to meet security requirements, and concluded that the action taken, without a hearing and without advice as to the specific grounds for the exclusion, was not violative of the right to due process." (443 F.2d at 649).

Parole is a method of rehabilitation and correction which serves only to change the place where the prisoner serves his sentence. It does not end that sentence, but simply interrupts it in an attempt to completely and fully rehabilitate the parolee. In essence, parole provides the inmate with an opportunity to gain a complete discharge of his sentence by satisfactorily serving a relatively short period in a controlled societal situation. If such period is served successfully, the parolee's sentence is discharged and he is granted complete freedom, but if the conditions of parole are violated, the security and welfare of society require immediate reincarceration.

The records of the Iowa Board of Parole indicate 2,443 inmates of Iowa institutions were granted paroles in the five year period ending January 1, 1971. During this same period, paroles were revoked in 808 cases. Thus, if a due process hearing is to be accorded every returnee, the burden on the courts, or the Parole Board, would be increased by approximately 160 cases a year. This would indeed place severe restrictions on the operation of the parole system. Not only would the hearing require considerable time and additional funds, but it would also call for a most significant increase in the number of investigative and administrative personnel involved.

The per cent of parolees who have been returned to prison in Iowa over the past five years is relatively high. This would seem to indicate a rather liberal attitude on the part of the Board of Parole in that every attempt is being made to integrate the prisoner back into society at the earliest possible time. The application to parole, revocations of a full due process hearing with the concomitant increase in administrative burdens would almost certainly result in a future denial of conditional liberty to inmates who, under present conditions, would be paroled. The most obvious and direct method to limit the administrative burdens and attendant costs is to deny parole to marginal cases and grant it only to those inmates who are least likely to become involved in future difficulty.

This result would appear to be contrary to the primary function of the parole system: that being to integrate the inmate back into society as soon as possible.

III.

THE INTRODUCTION OF AN ADVERSARY PROCEEDING INTO THE PAROLE SYSTEM WILL HAVE A DETRIMENTAL EFFECT ON THE REHABILITATION PROCESS

The goals of the Parole Board and the prisoner are very similar with respect to the return of the inmate to society as a useful member. The mutuality of purpose involved here was aptly described in *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir. 1963) cert. denied, sub nom *Thompson v. United States Board of Parole*, 375 U.S. 957 (1963) as follows:

"The bureau of Prisons and the Parole Board operate from the basic premise that the prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of *parens patriae*. In a real sense the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege. 'Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.' *Williams v. People of State of New York*, 337 U.S. at 249, 69 S. Ct. at 1084. Perhaps the more correct view is that retributive justice is satisfied by the conviction whereas the sentence is a process of treatment.

It is important to bear this in mind in determining whether there would be any gain to the parolee or to society in taking steps urged by the dissenting opinions which tend to equate parole processes with criminal prosecutions." (Id. at 237).

Petitioners have suggested that the Parole Board does not act in a role of *parens patriae* with respect to parole violations because determining the fact of violation presents an adversary situation. Certainly, this was not the situation in the cases of Morrissey and Booher nor is it the situation in the vast majority of parole revocation cases in Iowa.

Morrissey was accused of three instances of parole infraction, and the Report of violation indicates that he was advised of and admitted all three (A. 65-69). Likewise, Booher was accused of three parole infractions and the Report of violation filed by his parole officer indicates that he too was advised of and admitted all three (A. 105-108). Neither Morrissey nor Booher has ever denied committing the alleged infractions. Thus, establishment of the fact of parole violation, the area to which this Court is now asked to apply a due process hearing, was firmly established in the cases at bar by Petitioners' own admissions.

There was no controversy over whether or not Petitioners committed the alleged violations, and the determination of that fact did not present an adversary situation. Furthermore, the great majority of parole revocation cases in Iowa are similar to the case at bar in that there is no controversy between the Board of Parole and the parolee as to the fact of parole violation. In fact, since July of 1969, only three returnees have denied the violations alleged.⁵ Thus, the

⁵ Mr. Jack Beddel, a member of the Iowa Board of Parole since July of 1969, stated that during the time he has served on the Parole Board, all but three returnees have admitted commission of the parole infractions alleged. Mr. Beddel also noted that Petitioner Booher was not one of the three returnees who denied the alleged violations.

identity of interest between the Parole Board and the parolee is relatively unaffected even during the revocation process. The introduction of a due process hearing into this system at the revocation stage would create an adversary proceeding which would have a detrimental effect on this mutuality of interest and the attainment of the common goal.

IV.

THE PRESENT PAROLE SYSTEM IS NEITHER UNFAIR NOR ARBITRARY IN ITS OPERATION

Due process generally requires fair play, and many factors are involved in a determination of whether or not the Constitution requires that a specific right or rights be applied to a certain proceeding. Among those factors are the nature of the alleged right involved, the nature of the proceeding, and the possible administrative burdens on that proceeding (*Hannah v. Larche*, 363 U.S. 420 1960). In light of these factors and considering the fact that the basic question involved in the case at bar is whether or not the parole revocation procedures applied to Morrissey and Booher met the essential requirements of fair play, it may be helpful to examine the makeup and procedures of the Iowa Board of Parole.

The Iowa Board of Parole is a three member bipartisan board; at least one member of which must be a practicing attorney (§ 247.1, Code of Iowa, 1971). In the usual parole revocation situation, the parole agent is informed through various means that a parolee under his supervision has violated one or more conditions of his parole. Based on the information he has, the parole agent investigates the alleged violations and submits a written report of his findings to the Chief Parole Officer. Included in this report is a recommendation as to whether or not the parolee's parole should be revoked. A copy of this written report is sent to each of the Parole Board Members, who then take initial action based upon the results of the parole

agent's investigation and his recommendation. The Board members act independently at their respective domiciles as opposed to acting in concert. The decision of each of the Board members is forwarded to the Chief Parole Officer, and if two of the members have voted to revoke the parole, a warrant for the return of the parolee to the institution may be executed. Upon being returned to the institution, the returnee begins serving his sentence from the point he was at the day he was paroled. It should also be noted that the individual parole agent may request the local authorities to detain the parolee until this initial disposition by the Parole Board.

Within a short time after his return to the institution (never longer than two months), the returnee is given a hearing before the entire Parole Board. At this hearing the Parole Board goes over each of the alleged parole violations with the returnee, and he is given an opportunity to orally present his side of the story to the Board. If the returnee disagrees with or denies the violation report, it is the practice of the Board to continue the hearing and conduct a further investigation into the alleged violations. At the conclusion of the hearing, the Parole Board makes final disposition of the returnee's parole revocation by affirming the initial revocation, modifying it, or reversing it.

It is significant to note that during the period July 1969 to the present, only three returnees have denied the violations alleged in the parole officer's report. In all other revocation cases, the returnee admitted the alleged violations. In the three cases involving a denial of the alleged violations a further investigation was conducted by the Parole Board, and the revocations were affirmed in two of the cases. The revocation in the third case was reversed and the returnee's parole was reinstated.⁶

⁶ Much of the statistical material in this brief and all the information concerning the procedural operation of the Iowa Board of Parole was obtained from Mr. Jack Beddel of Rock Rapids, Iowa, the attorney member of the board since July, 1969.

If the contention of the Petitioners in the case at bar is that they were subjected to arbitrary action and were not dealt with fairly, that contention is without merit.

Morrissey's parole was initially revoked by the Board of Parole on January 31, 1969, and he was returned to the Iowa State Penitentiary where he was given a hearing before that Board on February 12, 1969. Booher's parole was initially revoked on September 13, 1969, and he was given a hearing at the Penitentiary on October 14, 1969.

It is realized that the revocation hearings granted in the cases of Morrissey and Booher did not occur prior to the initial revocation of parole. However, such hearings did precede the Board's final action on Petitioners' cases.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this court determined that the hearing required must be held prior to the termination of welfare benefits. The reason a prior hearing was required:

"... is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live, while he waits." (Id. at 264).

Such a reason was not present in the instant case, nor would it be present in other similar cases, and the hearing, if necessary at all, may properly be conducted subsequent to initial parole revocation. Certainly, the welfare, protection, and security of society requires that the parole violator be immediately reincarcerated. However, the time served pursuant to such reincarceration is not credited against the parolee's original sentence unless his parole has been revoked and he is returned to the institution (§ 247.12, Code of Iowa, 1971). Thus, the initial action of the Parole Board in releasing the parolee or revoking his parole is necessary to enable the returnee to gain credit against his original sentence for any time served prior to the Parole Board hearing and final action on his case.

In addition to Morrissey and Booher, the only persons present at Petitioner's respective hearings were the three

Parole Board members and an administrative clerk. Among the written documents available to the Board in each case was the written violation report prepared by the Petitioners' respective parole officers.⁷

Although the Parole Board may continue the hearing and conduct a further investigation into the alleged infractions, this was not done in the cases involving Morrissey and Booher. Since both Petitioners admitted the violations alleged, no further investigation was considered necessary.

Petitioners have cited *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), cert. denied, ___ U.S. ___ (1972), as setting forth basic safeguards to be provided in disciplinary actions involving prisoners. In this respect, the Court in *Sostre v. McGinnis*, stated:

"If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, see *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950), and afforded a reasonable opportunity to explain his actions." 442 F.2d at 198.

The parolee while on parole is still within the custody of the correctional authorities (Section 247.9, Code of Iowa (1971)) and as such, entitled to no greater rights than a prisoner.⁸ Thus, if any due process protections are to be

⁷All Petitioners' past Penitentiary records and copies of any police reports or statements of witnesses concerning the infractions being considered are also available to the Board at the time of the hearing.

⁸In *Rose v. Haskins*, 388 F.2d 91 (6th Cir. 1968), the court followed the reasoning of the Ohio Supreme Court in determining that a parolee and a trustee are in similar positions. Petitioner's contentions to the contrary notwithstanding, such determination appears

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applicable to parole revocations, those set forth in *Sostre* should be held sufficient. Such protections were provided in the case at bar.

Prior to revocation of their paroles, both Morrissey and Booher were advised by their respective parole officers of the violations alleged. At that time, they were each given an opportunity to deny or explain the alleged violations, and both admitted the infractions charged (A. 65-69, A. 105-108). In addition, both Morrissey and Booher were given individual hearings, subsequent to their reincarceration, before the independent three member Board of Parole. Again they were advised of each parole violation alleged and given an opportunity to deny or explain the allegations. Again, both admitted the infractions, and no further investigations were pursued.⁹ Petitioners were provided with all the process they were due, and under the circumstances it is difficult to perceive in what manner they would have been benefited by an additional investigation or a more complete due process hearing.¹⁰ Such a hearing would have served only to increase the administrative burdens and costs without significant additional benefits for the Petitioners. Accordingly, the fact of parole violation in the case of each Petitioner was rationally and fairly determined, and additional due process safeguards were not required.

valid. The difference in the conditional liberty of the parolee and that of the trustee is one of degree only, and it is, indeed, difficult to understand why the trustee's interest in maintaining his conditional status is not in every respect as great as the parolee's interest in maintaining his.

⁹Mr. George L. Paul a member of the Iowa Board of Parole since January 1964 stated that in all the parole revocation hearings held in the last five years no more than 10 returnees denied the alleged parole violations. Petitioner Morrissey was not one of these 10. See also Footnote 5.

¹⁰In fact, Petitioners appear to concede there is little reason to conduct an involved fact-finding hearing when the alleged violations are established by voluntary admission or conviction in a separate criminal proceeding. (Petitioners' Brief, p. 16).

CONCLUSION

For all the above reasons, this Court is respectfully requested to affirm the lower court judgment.

Respectfully submitted,

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FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5103

MAR 24 1972

MICHAEL RODAK, JR., CLERK

JOHN J. MORRISSEY and G. DONALD BOOHER,
Petitioners,

v.

LOU V. BREWER, WARDEN,
Respondent.

**BRIEF OF THE AMERICAN BAR ASSOCIATION,
AMICUS CURIAE**

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INDEX

| | Page |
|--|------|
| INTEREST OF AMICUS | 1 |
| THE QUESTION PRESENTED | 3 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 4 |
| I. The due process of law guaranteed by the Fourteenth Amendment entitles parolees faced with a loss of their liberty by revocation of parole to a hearing. | 4 |
| II. Provision of a hearing for revocation of parole serves the interests of the correctional process | 8 |
| CONCLUSION | 14 |

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Cases

| | |
|---|---|
| <i>Arciniega v. Freeman</i> , 404 U.S. 4 (1971) | 5 |
| <i>Baxstrom v. Herold</i> , 383 U.S. 107 (1966) | 8 |
| <i>Bearden v. South Carolina</i> , 443 F.2d 1090 (4th Cir. 1971) | 6 |
| <i>Bundy v. Cannon</i> , 328 F.Supp. 165 (D.Ma. 1971) | 7 |

| | |
|---|------|
| <i>Cluchette v. Procnier</i> , 328 F. Supp. 767 (N.D. Cal. 1971) | 7 |
| <i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970) | 3, 6 |
| <i>Hahn v. Burke</i> , 430 F.2d 100 (7th Cir. 1970) | 6 |
| <i>Haines v. Kerner</i> , 92 S. Ct. 594 (1972) | 5 |
| <i>Houghton v. Shafer</i> , 392 U.S. 639 (1968) | 5 |
| <i>Johnson v. Avery</i> , 393 U.S. 483 (1969) | 5 |
| <i>Landman v. Royster</i> , 333 F. Supp. 621 (E.D. Va. 1971) | 7 |
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| <i>Murray v. Page</i> , 429 F.2d 1359 (10th Cir. 1970) | 6 |
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United States ex rel. Campbell v. Pate,
401 F.2d 55 (7th Cir. 1969) 7

United States ex rel. Shuster v. Herold,
410 F.2d 1071 (2d Cir. 1969) 8

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393 U.S. 266 (1969) 5

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404 U.S. 15 (1971) 5

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| | |
|--|--------|
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| National Council on Crime and Delinquency, <i>Standard Probation and Parole Act</i> (1955 Revision, Reprinted 1964) | 12 |
| National Legal Aid and Defender Association, <i>The Standards for Defender Systems</i> , quoted in ABA Project on Minimum Standards of Criminal Justice, <i>Standards Relating to Providing Defense Services</i> , Appendix B (Approved Draft 1968) | 10 |
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| President's Commission on Law Enforcement and Administration of Justice, <i>Task Force Report: Corrections</i> 83, 88 (1967) | 11, 13 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and G. DONALD BOOHER,
Petitioners,

v.

LOU V. BREWER, WARDEN,
Respondent.

**BRIEF OF THE AMERICAN BAR ASSOCIATION,
AMICUS CURIAE**

INTEREST OF AMICUS*

The American Bar Association is a national membership organization of the legal profession. It counts as members more than 155,000 lawyers from all states and has for some years maintained an active interest in criminal justice improvement. One of its recent and more ambitious undertakings in this area has been the American Bar Association's

*Letters of consent from counsel for petitioners and counsel for respondent have been filed with the clerk of the Court.

Project on Minimum Standards for Criminal Justice, elements of which (as referred to in our argument) are pertinent to issues before the Court in this case.

In 1970, the American Bar Association established an interdisciplinary Commission on Correctional Facilities and Services to reflect its growing interest in and commitment to the correctional phase of criminal justice administration. The Commission has undertaken a program to stimulate broadscale improvement in all aspects, legal and operational, of the nation's systems for correction and rehabilitation of criminal offenders.

As the Association's major instrumentality for correctional reform, the Commission has a special interest in the issues of correctional administration and due process being litigated in this case. Among the Commission's several action projects are a National Parole Aide Volunteer Program which has brought it into direct contact with parole administrations in several states and a soon to be established Resource Center for Correctional Law and Legal Services concerned with resolution of the growing number of legal and constitutional questions now being raised in connection with the operation of correctional programs and systems. Focusing on the demands of both law and sound correctional practice, the Commission is anxious to contribute to full consideration of legal questions which bear so significantly on the effectiveness and fairness of our correctional apparatus.

With due recognition of the extended legal analysis offered in the briefs of the parties and other amici, the Association has briefly set forth its views herein on the important question involved in this case.

THE QUESTION PRESENTED

Whether revocation of parole without a hearing violates the Fourteenth Amendment of the United States Constitution by depriving a person of liberty without due process of law.

SUMMARY OF ARGUMENT

In the view of amicus, the judgment of the court below in this case is erroneous. It seems to rely on the largely abandoned "hands-off" doctrine as its rationale for not inquiring whether petitioners have been denied due process of law as guaranteed by the Fourteenth Amendment.

As cases have come before it in recent years, this Court has upheld the existence of due process rights in other correctional contexts where substantial deprivations of liberty or other constitutionally protected interests have been imposed by administrative action. In this case, the Court is asked to affirm the right of parolees to a hearing before their parole may be revoked for alleged violation of parole conditions. In so doing, the Court's action would be supportive of decisions in other Courts of Appeals *contra* to that of the Eighth Circuit in this case, both directly and by implication.

Although several rationales have been suggested by the court below to support the notion that this case involves a privilege rather than a right, this Court in *Goldberg v. Kelly* indicated it is the substantive interests at stake which must be examined, and not the characterization of them. Petitioners have a substantial interest in not being deprived of their liberty summarily based solely on assertions regarding their conduct, the accuracy of which they challenge.

The best thinking of correctional authorities, as set forth in the professional standards of the American Correctional Association and the National Council on Crime and Delinquency, is that parole should not be revoked without offering a hearing to the parolee. This is also the judgment of the American Bar Association and the actual practice in most correctional systems. It is incorporated in such model legislation as the Model Penal Code and was the recommendation, too, of the President's Commission on Law Enforcement and Administration of Justice.

The Court should promote the rule of law in corrections by recognizing that these petitioners cannot be returned from parole status in the community to prison confinement without a hearing.

ARGUMENT

I. THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT ENTITLES PAROLEES FACED WITH A LOSS OF THEIR LIBERTY BY REVOCATION OF PAROLE TO A HEARING.

The court below ruled that a parolee can be returned to prison based on the *ex parte* allegations of his parole officer that he violated some condition of his parole. The court's opinion seems to be premised on the assumption that courts, particularly federal courts, should not interfere with the operations of state penal systems. The administration of prisons, probation and parole is deemed a matter of state concern, and any changes in procedures are considered a matter of legislative rather than judicial competence. *Morrissey v. Brewer*, 443 F.2d 942, 951-952 (8th Cir. 1971). Thus the four-judge majority appears to have based its decision on the traditional notion of judicial abstention in prison cases, otherwise known as the "hands-off" doctrine.

If the judicial history of the past ten years has made one thing clear, it is that federal courts will no longer rely on the doctrine of "hands-off" to deny convicted offenders access to the courts. The most recent example of repudiation of the "hands-off" approach occurred in *Haines v. Kerner*, 92 S.Ct. 594 (1972) (*per curiam*). The district court had dismissed without a hearing a petition alleging lack of due process and the infliction of physical injuries suffered by an inmate in the course of undergoing discipline within a state prison. The United States Court of Appeals for the Seventh Circuit affirmed, based on the premise that federal courts should not inquire into the internal operations of state penitentiaries. This Court reversed.

The instant case, which involves the reimprisonment of parolees who already had been granted conditional liberty, presents an even weaker case for invoking the internal discipline rationale than *Haines*. Reversal of the decision below would not be venturing into new territory; indeed, any other action would be inconsistent with the thrust of this Court's recent decisions involving the rights of convicted offenders. See, e.g., *Wilson v. Kelley*, 393 U.S. 266, (1969) (*per curiam*); *Houghton v. Shafer*, 392 U.S. 639 (1968) (*per curiam*); *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*); *Mempa v. Rhay*, 389 U.S. 128 (1967); *Arciniega v. Freeman*, 404 U.S. 4 (1971).

In its decisions in *Johnson v. Avery*, 393 U.S. 483 (1969), and *Younger v. Gilmore*, 404 U.S. 15 (1971) (*per curiam*), this Court has evidenced particular concern for ensuring prisoners' right of access to court. It is essential that judicial avenues be kept open as a last resort. Yet courts can perform only a small part of the role of overseeing correctional operations. Consequently, the trend of many recent federal court decisions has been to recognize a right to due process protections within the correctional

system. The principle that offenders do not lose their constitutional rights to due process of law by now has become too widely accepted to require argument.

Various theories have been used to justify the inapplicability of due process protections to the revocation of parole. All have been questioned by recent judicial decisions and are dealt with in full by the Brief of the American Civil Liberties Union, *Amicus Curiae*, in this case. Chief among the legalistic rationales is the argument that parole is a privilege rather than a right, and thus may be revoked summarily. This distinction, long out of favor, was finally laid to rest by the Court's statement in *Goldberg v. Kelly*, 397 U.S. 254, 262, (1970) that "the constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege' and not a 'right'". The *Goldberg* decision, which involved the termination of welfare benefits without a hearing, also rebuts the argument that the classification of a proceeding as administrative rather than criminal eliminates the need for procedural protections. This rationale was used by the court below in seeking to create a distinction between revocation of parole and revocation of probation, which already has been ruled to require a hearing. *Mempa v. Rhay*, 389 U.S. 128 (1967); *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970). Indeed, courts of appeals in two other circuits have expressed views *contra* to the eighth circuit in *Morrissey* on the necessity of hearings in parole revocation proceedings. *Bearden v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971); *Murray v. Page*, 429 F.2d 1359 (10th Cir. 1970).

The fact that the consequences of a revocation of parole can be as grave as a return to prison clearly brings the present case within the purview of the balancing test enunciated in *Goldberg*, namely, that "the recipient's interest in avoiding that loss outweighs the government interest in summary adjudication." 397 U.S. at 263. In the

instant case, petitioners have served three additional years in prison based on the *ex parte* statements of their parole officers that they had violated the terms of their parole. The reports, which would have been considered hearsay in court, charged "numerous violations" of the conditions of parole, including in one case the purchase of an automobile under an assumed name, unauthorized operation of the vehicle, purchase of furniture by use of an assumed name in order to obtain credit and several violations of employment conditions; in the other case, leaving the county without the parole officer's consent, obtaining a drivers license by use of an assumed name, unlawful operation of a motor vehicle, and the violation of employment conditions. *Morrissey v. Brewer*, 443 F.2d 942, n. 1, 943, n. 2 (8th Cir. 1971). In both cases, when the petitioners learned of the reasons for the revocations, they disputed some or all of the factual allegations. However, in neither case were they afforded the opportunity to confront the authors of the reports, to question them concerning the source of the information or to present independent evidence of their own. The decision to return the petitioners to prison lacked the most rudimentary requirements of due process.

Extension of the right to a hearing to prisoners facing serious internal disciplinary action by prison officials goes beyond the claim of petitioners in the present case. However, the provision of such is being ordered in a growing number of federal court decisions addressing procedural due process issues in prison disciplinary actions that involve the loss of statutory good-time credits or the meting out of serious deprivations within the prison, such as solitary confinement. *E.g.*, *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *United States ex rel. Campbell v. Pate*, 401 F.2d 55 (7th Cir. 1968); *Landman v. Royster*, 333 F.Supp. 621 (E.D.Va. 1971); *Cluchette v. Procunier*, 328 F.Supp. 767 (N.D.Cal. 1971); *Bundy v. Cannon*, 328 F.Supp. 165 (D.Md. 1971).

Cases involving the transfer of prisoners between institutions provide another analogy to the present case. In *Baxstrom v. Herold*, 383 U.S. 107 (1966), this Court rejected a statutory procedure under which a prisoner was civilly committed upon expiration of his penal sentence. Since all other persons civilly committed were entitled to a jury trial on the question of sanity before being transferred, the commitment of prisoners at the request of the director of a state hospital was held to constitute a denial of equal protection of the laws. Although *Baxstrom* involved a person no longer under criminal sentence, the decision served as precedent for two cases in which no extension of the length of sentence was involved but offenders were transferred from one institution to a more restrictive institution. In *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969), the Court of Appeals for the Second Circuit ruled that a prisoner who had been sentenced to a term of from twenty-five years to life was entitled to a hearing before being transferred to the Dannemora State Hospital for the criminally insane; in *Shone v. Maine*, 406 F.2d 844 (1st Cir. 1969), a hearing was required before an "incurable" juvenile delinquent could be transferred from a juvenile institution to a men's prison. In both of these cases a transfer between custodial situations was at issue. If hearings are to be required in such circumstances, they are required *a fortiori* when a parolee who has been at liberty in the community, albeit with certain conditions attached, is returned to prison.

II. PROVISION OF A HEARING FOR REVOCATION OF PAROLE SERVES THE INTERESTS OF THE CORRECTIONAL PROCESS.

The American Correctional Association, which is the professional organization of prison administrators, has endorsed the principle of providing hearings when parole is

revoked. The A.C.A. deals with the subject of parole revocation in its *Manual of Correctional Standards* (3d edition, 1966), which recognizes that:

To an even greater extent than in the case of imprisonment, probation and parole practice is determined by an administrative discretion that is largely uncontrolled by legal standards, protections, or remedies. Until statutory and case law are more fully developed, it is vitally important within all of the correctional fields that there should be established and maintained reasonable norms and remedies against the sorts of abuses that are likely to develop where men have great power over their fellows and where relationships may become both mechanical and arbitrary. *Id.* at 279.

Despite the fact that the latest edition of the *Manual* was prepared before most of the court decisions recognizing the right to a hearing upon revocation of probation or parole, it specifically provides for parole revocation hearings:

As soon as practicable after causing an alleged violator taken into custody on the basis of a parole board warrant, the prisoner should be given an opportunity to appear before the board or its representative. The prisoner should be made fully aware of the reasons for the warrant, and given ample opportunity to refute the charges placed against him or to comment as to extenuating circumstances. The hearing should be the basis for consideration of possible reinstatement to parole supervision on the basis of the findings of fact or of reparole where it appears that further incarceration would serve no useful purpose. *Id.* at 130.

In point of fact, the majority of parole systems currently provide for hearings on parole revocation (all but eight states) without apparent disadvantage in relation to the handful of states which, like Iowa in *Morrissey*, still fail to meet this procedural requisite (see Appendix A, Brief of the American Civil Liberties Union, *Amicus Curiae*, in this case).

The American Bar Association is in full agreement with the American Correctional Association in this instance. The position that a hearing is to be afforded on parole revocation is consistent with several sets of criminal justice standards formally approved by the Association through its House of Delegates.

For example, *The Standards for Defender Systems*, promulgated by the National Legal Aid and Defender Association in 1965 and adopted by the A.B.A. House of Delegates in 1966, provide for legal representation in parole and probation violation proceedings, obviously assuming the provision of hearings. See American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Providing Defense Services*, Appendix B (Approved Draft, 1968). Further exposition of the provision of counsel on revocation of probation or parole in the *Standards Relating to Providing Defense Services* also presupposes the existence of hearings (§4.2 at 40-43).

As late as 1970, the Project on Minimum Standards for Criminal Justice issued a hearing requirement for revocation of probation. *Standards Relating to Probation*, Section 5.4 (Approved Draft, 1970). The reasons are stated in the Commentary to Section 5.4(a):

The probation revocation proceeding involves exactly the same kind of problem as is involved in the criminal trial itself—the ascertainment of historical events about which there may

be some dispute and the consideration of those events against a standard of conduct to which the probationer is expected to adhere.

Parole revocation also turns on ascertainment of historical events against a standard of conduct expected of the parolee. Coupled with the threat of incarceration present in such situations, it seems indistinguishable from considerations inherent in revoking probation.

Similarly, the President's Commission on Law Enforcement and Administration of Justice, recommended in *The Challenge of Crime in a Free Society* 150 (1967), that legal assistance be provided in parole and probation revocation proceedings, also presuming that such hearings would be held. The Commission's Task Force on Corrections explicitly provided that:

The offender threatened with revocation should... be entitled to a hearing comparable to the nature and importance of the issue being decided. Where there is some dispute as to whether he violated the conditions of his release, the hearing should contain the basic elements of due process—those elements which are designed to ensure accurate factfinding. *Task Force Report: Corrections* 88 (1967).

The *Model Penal Code* of the American Law Institute also contemplates hearings on charges of parole violation:

When a parolee has been returned to the prison, the board of parole shall hold a hearing within sixty days of his return to determine whether his parole should be revoked. The parolee shall have reasonable notice of the charges filed. The institutional parole staff shall render reasonable aid to the parolee in preparation for

the hearings and he shall be permitted to advise with his own legal counsel. At the hearing, the parolee may admit, deny or explain the violation charged, and he may present proof, including affidavits and other evidence, in support of his contention. Section 305.15, Proposed Official Draft (1962).

The National Council on Crime and Delinquency, whose membership includes a large number of probation and parole officers and other professionals, as well as private citizens, promulgated a *Standard Probation and Parole Act* in 1955. Section 25 of the Act specifically provides for hearings whenever parole is alleged to have been violated. Since publication of its 1955 Act, the NCCD has gone further and recommended hearings as part of internal prison disciplinary procedures:

Any punishment that may affect the sentence or parole eligibility (such as the loss of good-time allowance) shall not be imposed without a hearing at which the prisoner shall have a right to be present and a right to be represented by counsel or some other person of his choice. National Council on Crime and Delinquency, *A Model Act for the Protection of Rights of Prisoners*, Section 4 (1972).

It should be noted that all the cited standards and model enactments seek to accord procedural protections beyond the minimal hearings rights at issue in this case.

We are a society dedicated to the rule of law. Yet to this day, but for the recent decisions by this Court and lower federal courts, our correctional systems have operated without the procedural safeguards generally considered essential even for administrative actions concerning interests in property. The present case presents an instance of the

way in which the system can act arbitrarily by relying on the unverified allegations of an individual to, deprive an offender, of his personal liberty. It is just this type of administrative activity, devoid of rudimentary fairness, that constitutes one of the most frequently voiced grievances of offenders and tends to vitiate their respect for the law. As the President's Crime Commission noted:

... a system which recognizes that offenders have certain rights is not inconsistent with the goal of rehabilitation. A person who receives what he considers unfair treatment from correctional authorities is likely to become a difficult subject for reformation. And the "collaborative regime" advocated in this volume is one ... which seeks to encourage self-respect and independence in preparing offenders for life in the community. It is inconsistent with these goals to treat offenders as if they have no rights and are subject to the absolute authority of correctional officials. *Task Force Report: Corrections* 83 (1967).

The parolee is in the community and but one step removed from complete release to society. If, as federal programs are now emphasizing, the future of criminal corrections lies in the direction of community programs, there is a vital need to assure the individual offender that the opportunity to participate in such programs, once gained, is not lost to him through the arbitrary actions of a single official operating without responsibility to account for his decisions or to ensure that they are based on verified facts. Implementation of this principle that offenders have the right to expect fair procedures from correctional authorities, rather than impeding the correctional process, is essential if the system is to achieve its goal of rehabilitating offenders. See e.g., F. Cohen, *The Legal Challenge to Corrections: Implications for Manpower and Training*, 105

(1969); R. Goldfarb and L. Singer, *Redressing Prisoners' Grievances*, 39 Geo. Wash. L. Rev. 175 (1970); P. Hirschkop and M. Millemann, *The Unconstitutionality of Prison Life*, 55 Va. L. Rev. 795 (1969); R. Kutak, *From the Outside Looking In: Grim Fairy Tales for Prison Administrators*, Law Enforcement Assistance Administration (Monograph, 1970).

The courts are sensitive, as never before, to the necessity of bringing the rule of law into the correctional system. Confirmation of the applicability of due process hearing rights in parole revocation proceedings will, in the view of the American Bar Association, constitute a sound and timely step toward realization of that objective.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

TERM, 1971

No. 71-5103

Supreme Court, U. S.
FILED

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MICHAEL ROBERT JR., CLERK

JOHN J. MORRISSEY and G. DONALD BOOHER,

Petitioners,

v.

LOU V. BREWER, WARDEN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
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PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

Petitioners' statement of these cases is set forth at pages 4-7 of Petitioners' Brief and Petitioners do not wish to make any addition thereto or corrections therein.

ARGUMENT

Petitioners' in this Reply Brief do not wish or intend to review or discuss the principal points and issues discussed in their initial brief. However, there are a limited number

of issues raised in Respondents' Brief which were not discussed in Petitioners' Brief and to which Petitioners feel they must respond. Petitioner will not, therefore, discuss herein the various arguments set forth in Petitioners' Brief, but will comment only on points raised by Respondents' Brief and not fully covered in Petitioners' Brief.

A PAROLEE'S INTEREST REMAINING AT LIBERTY GREATLY OUTWEIGHS THE STATE'S IN SUMMARY PAROLE REVOCATION

In discussing the nature of the state interest involved in the parole revocation situation, the Respondents state at page 12 of Respondents' Brief that "the precise government interest involved is the welfare and security of society." At page 11 of their Brief, Respondents also state that "the safety, security and welfare of the citizens of the state far outweighs the interest of the parolee in remaining in a position of conditional liberty *pending determination of a parole violation*" (emphasis added). Finally, at page 13 of their Brief, Respondents, in discussing parole as a method of rehabilitation and correction, state that, *if* the conditions of parole are violated, the security and welfare of society require immediate reincarceration" (emphasis added). It is apparent to Petitioners from the above quoted portions of Respondents' Brief that Respondents are greatly concerned with the "welfare and security of society" and feel that the protection of society as a whole from parolees suspected of parole violations is a major, if not the primary, interest of the state to be considered in balancing the interests of the parolee as against the interest of the state in determining whether or not a revocation of parole can be constitutionally accomplished without first affording the parolee a hearing. While Respondents in other portions of their Brief also complain of an increase in the administrative burden which would be required by a hearing prior to revocation of parole and that the requirement of a hearing would have a detrimental effect on the rehabilitation process,

it is evident that Respondents are quite concerned with the protection of society from suspected parole violators. While Petitioners submit that the definition of the government interest as the "welfare and security of society" is hardly precise as is suggested by Respondents, Petitioners further submit that Respondents have incorrectly perceived the relevant interests which must be weighed as directed by this court in *Goldberg v. Kelly*. Petitioners agree with Respondents that if the conditions of parole have been violated and the Board of Parole has in its judgment determined that a parolee is not a good risk on the outside, reincarceration may be required. However, Petitioners submit that the "if" in the preceding sentence is critical and that they are entitled to a hearing prior to the determination of the fact of violation of their paroles. Finally, with respect to the above quoted portions of Respondents' Brief, and in particular the portion stating that the safety, security and welfare of the citizens of the state far outweighs the interest of the individual parolee *in remaining in a position of conditional liberty pending determination of the parole violation*, Petitioners submit that what is at issue in this case is not whether or not a parolee shall remain in a position of conditional liberty *pending determination of a parole violation*, but whether or not his conditional liberty as a parolee shall be revoked, requiring him to return to prison to serve the remainder of his sentence, without due process of law. If the only interest of the parolee which were involved in this case was the question of whether or not he should be imprisoned pending a determination of the fact of parole violation, Petitioners may well concede that the interests of society may outweigh his interest in remaining free during the relatively short period of time required to determine whether or not his parole had in fact been violated. This would be particularly true if it can be assumed that a parolee would not be arrested and incarcerated pending action concerning his parole unless reasonable cause to believe that a violation had occurred had been shown. As a matter of fact, both of Petitioners herein were arrested and confined

to county jails in Iowa during the period of time in which the Iowa Board of Parole was considering the revocation of their respective paroles. Petitioner Morrissey was arrested and held in the Linn County, Iowa Jail for approximately seven days awaiting action by the parole board with respect to the revocation of his parole. (A. 30, 65-69) Petitioner Booher was arrested and confined in the O'Brien County, Iowa Jail for approximately sixteen days waiting for the Iowa Board of Parole to determine whether or not to revoke his parole. (A. 109-10) Petitioners have not specifically complained about this period of confinement *pending determination of a parole violation*. Petitioners do, however, complain that their paroles were revoked and that they were ordered to return to the state penitentiary to serve out the remainder of their respective sentences, without having been granted a prior hearing before the Board of Parole.

THERE IS NO EVIDENCE IN THE RECORD IN THESE CASES WITH RESPECT TO THE ALLEGED PRACTICE OF THE IOWA BOARD OF PAROLE IN GRANTING POST-REVOCATION "HEARINGS" OR WITH RESPECT TO WHETHER OR NOT ANY SUCH "HEARING" WAS GRANTED TO EITHER OF THE PETITIONERS HEREIN.

Respondents devote a considerable portion of their Brief, particularly on pages 16 through 20 thereof, discussing the alleged practice of the Iowa Board of Parole regarding parole revocations. Respondents state in substance that the initial determination to revoke a parole is made by an independent vote of the three Iowa Board of Parole members based solely on the information in the parole agent's written report, and that if this determination is to revoke, the parolee is returned to the penitentiary to commence serving the remainder of his sentence. Respondents further state that it is the practice of the Board of Parole to then conduct a "hearing" at the penitentiary at which time the parolee is given an opportunity to "orally present his side

of the story to the Board." Respondents further allege at page 18 of their Brief that Petitioners Morrissey and Boohar were given hearings before the Board of Parole after their paroles were revoked and they were reincarcerated in the Iowa State Penitentiary. In addition, Respondents make several references to statistical information regarding the number of returnees who have, at this post-revocation "hearing," denied the parole violations alleged in the parole agent's report. In various footnotes of Respondents' Brief, Respondents attribute this statistical information and all of the information concerning the general procedural operation of the Iowa Board of Parole, as well as the application of this alleged procedure to Petitioners herein, to interviews with Mr. Jack Beddel and Mr. George L. Paul, members of the Iowa Board of Parole. All of this information concerning the statistics relating to parole revocations and the procedural operation of the Iowa Board of Parole is entirely outside the record in these cases. None of this information was submitted to the District Court below nor was any of this information submitted in any form whatsoever to the United States Court of Appeals for the Eighth Circuit in the cases below. In addition to being completely outside of the record, Petitioners submit that such allegations are subject to question since they appear to be based solely upon the recollection of the Board of Parole members interviewed, as opposed to based upon any statistical records kept by the Board of Parole. In addition, the alleged practice of the Board of Parole regarding post-revocation "hearings" does not appear to have any statutory basis nor any basis in any regulations or rules promulgated by the Board of Parole or any other body in the government of the State of Iowa. Further, this "evidence" is subject to question as to its credibility for the reasons that it is derived from persons who are vitally interested in the outcome of these cases, is not sworn to and has not been tested by cross-examination, as would normally be the case with oral testimony such as that obtained from an interview with an interested party. Finally, the accuracy of certain statements attributed to Mr.

Beddell and Mr. Paul to the effect that only three returnees have denied alleged parole violations since July, 1969, that only ten returnees have denied parole violations since January, 1964, and that neither Petitioner Booher nor Petitioner Morrissey were among those who have denied alleged violations, are subject to question on the basis of the evidence that is in the record before this Court. First, there is no evidence in the record now before this Court other than the parole agent's report, which indicates that the Petitioners either admitted or denied that they had violated their paroles. As explained in a subsequent portion of this Brief, the statement by Respondents that both Petitioners Morrissey and Booher admitted all of the alleged parole violations is not accurate, particularly in view of the mitigating circumstances and explanations given by Morrissey and Booher in connection with the alleged violation of their parole conditions.

Therefore, because the allegations concerning the alleged practice of the Iowa Board of Parole in conducting a "hearing" are wholly outside of the record in this case and because the substance of such allegations is subject to question as pointed out herein, Petitioners believe that this Court should not rely on and should disregard the allegations in Respondents' Brief concerning such an alleged post revocation "hearing," both as a general practice of the Board of Parole and as it relates to these cases.

Even though Petitioners consider these allegations unsupported by the record herein, Petitioners take this opportunity to point out to the Court some significant aspects of these allegations if they were, in fact, true. For example, the second paragraph of Division IV of Respondents' Argument, beginning on page 16 of Respondents' Brief and continuing on page 17 thereof, clearly indicates the lack of procedural due process afforded parolees in the State of Iowa, prior to the entry of orders of the Iowa Board of Parole, revoking their paroles. Apparently, the sole information available to the parole board members at the time they made their decisions to revoke the paroles of Petitioners herein was the

written report of the parole agent, copies of which are found at pages 65-69 and 105-108 of the Appendix herein. In addition, the parole board members did not apparently even consult with each other concerning the decision to revoke but, after reading the parole agent's report merely, mailed their individual decision to the Chief Parole Officer who tallies the votes and then apparently processes the order revoking parole and ordering the parolee returned to the penitentiary.

It is further interesting to note from the statistics provided in Respondents' Brief that since July 1969, only three parolees whose paroles have been revoked have denied that they have in fact violated their parole and since January of 1964, only ten parolees whose paroles have been revoked have denied in fact violating their paroles. While Petitioners challenge these statistics as outside of the record herein and not, for the reasons stated above, reliable, if these statistics were approximately accurate, it appears that the administrative burden upon the Iowa Board of Parole to provide a hearing with due process procedural requirements would not be a large administrative burden inasmuch as approximately only one such hearing would be held each year. Finally, with respect to the statistics provided in Respondents' Brief, Respondents apparently, and for the first time on this appeal, place considerable reliance upon the purported or alleged post-revocation "hearing" held at the penitentiary after the parolee has been returned to the penitentiary and reincarcerated. They apparently are seeking to lead this Court to believe that the actual and final decision to revoke parole is not made prior to the time the order revoking parole is entered, but that the order revoking parole is entered solely for the purposes of obtaining immediate reincarceration, for the security and welfare of society, and that, in fact, a meaningful hearing is held at a later time. However, the statistics cited by Respondents in their Brief indicate that there are approximately 160 paroles revoked each year in the State of Iowa. This would result in approximately 540 parole revocations since July of 1969, and yet, it should be

noted that Respondents' statistics indicate that the initial revocation decision was reaffirmed in all but one of the revocations since July of 1969. For all practical purposes, then, the initial revocation decision, made without granting the parolee a hearing, is the final decision of the Iowa Board of Parole.

**THE RECORD HEREIN DOES NOT SUPPORT
RESPONDENTS' STATEMENT THAT PETITION-
ERS HAVE ADMITTED ALL OF THE ALLEGED
VIOLATIONS OF THEIR PAROLE**

Respondents' Brief, at page 15 thereof, states that both Petitioners Morrissey and Booher were each accused of three instances of parole violations and that each were advised of and admitted all three violations, and that further, neither Morrissey nor Booher have ever denied committing the alleged violations. Respondents conclude, therefore, that the fact of violation was firmly established in each of the cases at bar and that, therefore, there was no controversy over whether or not Petitioners committed the alleged violations, and that no hearing was therefore required. Further, by way of footnote #5 on page 15 of Respondents' Brief and footnote #9 on page 20 of Respondents' Brief, Respondents state that, according to the recollection of Parole Board member Jack Beddel, in the case of Booher, and of Parole Board member George L. Paul, in the case of Morrissey, neither Booher nor Morrissey denied the alleged parole violations at the time of the alleged "hearing" which took place after their parole revocation and reincarceration in the Iowa State Penitentiary. Respondents also stated on page 20 of their Brief that both Petitioners Morrissey and Booher were advised of their parole violations and admitted the same prior to the revocation and that they were again, advised of their alleged parole violations and admitted the same at the time of the alleged "hearing" at the Iowa State Penitentiary. In support of their allegations that Petitioners Morrissey and Booher admitted violations of their parole,

written report of the parole agent, copies of which are found at pages 65-69 and 105-108 of the Appendix herein. In addition, the parole board members did not apparently even consult with each other concerning the decision to revoke but, after reading the parole agent's report merely mailed their individual decision to the Chief Parole Officer who tallies the votes and then apparently processes the order revoking parole and ordering the parolee returned to the penitentiary.

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VIOLATIONS OF THEIR PAROLE**

Respondents' Brief, at page 15 thereof, states that both Petitioners Morrissey and Booher were each accused of three instances of parole violations and that each were advised of and admitted all three violations, and that further, neither Morrissey nor Booher have ever denied committing the alleged violations. Respondents conclude, therefore, that the fact of violation was firmly established in each of the cases at bar and that, therefore, there was no controversy over whether or not Petitioners committed the alleged violations, and that no hearing was therefore required. Further, by way of footnote #5 on page 15 of Respondents' Brief and footnote #9 on page 20 of Respondents' Brief, Respondents state that, according to the recollection of Parole Board members Jack Beddel, in the case of Booher, and of Parole Board member George L. Paul, in the case of Morrissey, neither Booher nor Morrissey denied the alleged parole violations at the time of the alleged "hearing" which took place after their parole revocation and reincarceration in the Iowa State Penitentiary. Respondents also stated on page 20 of their Brief that both Petitioners Morrissey and Booher were advised of their parole violations and admitted the same prior to the revocation and that they were again, advised of their alleged parole violations and admitted the same at the time of the alleged "hearing" at the Iowa State Penitentiary. In support of their allegations that Petitioners Morrissey and Booher admitted violations of their parole.

Respondents cite only the written report of violation prepared by the parole agents in charge of supervising the parole of the respective Petitioners, and information obtained from an interview with Parole Board members Beddel and Paul.

As is indicated elsewhere in this Brief, the information obtained in the interviews from Board members Beddel and Paul is entirely outside of the record in this case and is subject to question in view of the fact that it appears to be based only on recollection and an apparent failure of either board members Beddel or Paul to recall specifically the cases of Booher or Morrissey, since the statements attributed to each of said Board members is solely that during their term of office as Board of Parole members only a small number of persons have denied alleged parole violations and that the Petitioners herein were not among those who had denied the alleged violations. Apparently the Board members Beddel and Paul could not state that either Booher or Morrissey denied the alleged violations, but only that they were not in that group of persons that Messrs. Beddel and Paul could remember having denied the alleged parole violations.

An examination of the record in these cases will indicate that an unqualified statement that both Petitioner Morrissey and Petitioner Booher admitted all of the alleged parole violations, is not supported by the evidence in this case. First, the only evidence in this record relating to the alleged parole violations is the Report of Violation prepared by the parole agent supervising the paroles of the respective Petitioners. The Report of Violation concerning Petitioner Morrissey is found at pages 65-69 of the record herein and contains many statements by the parole officer concerning information obtained by him through various hearsay sources. Said report alleges that Petitioner Morrissey violated three parole rules. The first rule is that the parolee is to find a rooming place which would be approved by the parole agent on his first visit, and that he will immediately report any change of rooming place to the Chief Parole Officer, which shall


be subject to approval by the parole agent on his next visit. Secondly, Morrissey is alleged to have violated the rule stating that he will in all respects conduct himself honestly, avoiding questionable associates, obeying the law, keeping reasonable hours, avoiding all places of questionable reputations and taverns, and consulting his parole agent before incurring indebtedness. Thirdly, Morrissey is alleged to have violated the rule prohibiting ownership or operation of a motor vehicle without the written consent of the Chief Parole Officer.

An examination of the parole agent's report shows, in the section entitled "Parolee's version of the offenses," that Morrissey could give no explanation as to why he failed to contact the parole agent from January 10, 1969, through January 24, 1969. The report, however, indicates that Morrissey claimed that he had been sick from January 13, 1969, to January 18, 1969, and that that was the reason he had missed work during that period of time. Morrissey also, according to the parole agent's report, stated that his doctor advised him that he did not have to call his employer to inform him that he was sick, but that the doctor would submit a note to the employer concerning the illness. Thus, as opposed to admitting, without qualification, that he violated conditions of his parole, Morrissey had, in connection with the matter of having failed to report to the parole agent for a period of two weeks, stated that he had been sick and under a doctor's care and that his doctor had agreed to give him a note about his illness for his employer. Further, according to the parole officer's report, Petitioner Morrissey admitted that he had bought furniture at the Becker Furniture Store under the name of D. Leo Morrissey and that he had signed an agreement (apparently a purchase agreement) in that name. Petitioner Morrissey, however, stated to the parole agent upon questioning that he did not remember picking up the furniture at the store and thought that it was still in the store, or that he did not know where the furniture was. Thus, the Petitioner apparently admitted

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only that he had signed a purchase agreement in the name of D. Leo Morrissey, but did not admit that he had picked up the furniture, and further stated that he did not know where the furniture was.

In view of the limited nature of the admissions reported by the parole agent in his written report and further in view of the mitigating circumstances and explanations given by Petitioner Morrissey concerning a portion of the alleged violations, it can hardly be said unequivocally that the Petitioner Morrissey admitted all of the alleged parole violations with which he was charged.

The Report of Violation prepared by Petitioner Booher's parole agent appears at pages 105-108 of the Appendix herein. An examination of that report will show that the parole agent recommended revocation of Petitioner Booher's parole based upon the violation of three parole rules. First, the Petitioner is reported to have violated the rule requiring that he will remain in supervised employment unless he obtains written consent from the Chief Parole Officer to change therefrom, and agrees to keep himself gainfully employed during his parole period. Secondly, he is alleged to have violated the rule prohibiting him from going beyond the territorial limits of O'Brien County without the written consent of the Chief Parole Officer. Finally, he is charged with violating the rule prohibiting him from owning or operating a motor vehicle without the written consent of the Chief Parole Officer.

As in the case of the written Report of Violation concerning Petitioner Morrissey, the report concerning Petitioner Booher contains many statements outside the personal knowledge of the parole agent and in connection with which he apparently relied upon hearsay statements from other persons. In connection with the alleged violation concerning his employment, the parole agent's written report indicates that the agent and Petitioner Booher had conversations concerning the obtaining of employment during which the Petitioner expressed dissatisfaction with the rate of pay

he could get. In addition, Petitioner apparently admitted to the parole agent that during one period of time he had been working for Iowa Beef Packers, in Dakota City, Nebraska. There are no other statements in the parole officer's report attributable to the Petitioner concerning his employment. Even though there is a reference to the fact that Petitioner had previously lost employment at two places due to his temper, these references apparently relate to instances occurring approximately eight months prior to the parole agent's report and did not comprise a basis of the alleged violations pursuant to which the Petitioner's parole was revoked. It can hardly be said that the Report of Violation shows an admission on the part of Booher, that he violated the terms of his parole.

With respect to the charge that the Petitioner had left the territorial boundaries of O'Brien County, Iowa, the only statements in the parole agent's report attributable to Petitioner concerning the Petitioner's absence from O'Brien County related to his statement that he had been working in Dakota City, Nebraska, and that he had been in Mt. Pleasant, Iowa. Since Petitioner was arrested in O'Brien County, however, it is apparent that his absence from the county was only temporary. The report contains no information concerning the reason why the Petitioner had been in Mt. Pleasant, Iowa, and in this respect, it should be noted that during the time in which the alleged violations occurred, the Petitioner's parole officer was on vacation and possibly unavailable for obtaining of permission to leave the county. Finally, although the statement is not attributable to the Petitioner, there is an indication that during this period of time the Petitioner's wife had gone to Iowa City, Iowa, to the hospital there to have a baby. The report does not indicate whether or not the Petitioner also went to Iowa City, although the parole agent reports that the Petitioner stated that the fact that his wife was in the hospital, and that he had been denied a transfer to the State of Minnesota, were reasons given by the Petitioner to explain his actions. While the report

states that the Petitioner did admit that he had continued to operate a motor vehicle, apparently the motor vehicle licensed in his wife's name, the report does not support the statement in Respondents' Brief that the Petitioner admitted all alleged violations of his parole. Finally, it is true that Petitioners state in their Brief in chief that a lengthy or involved fact-finding hearing would not seem to be necessary in those cases in which a violation of parole condition is established by either voluntary admission by a parolee or by conviction of a parolee of a separate criminal offense. Petitioners submit that they should not be denied the opportunity of a hearing to which they would otherwise be constitutionally entitled, on the basis of the limited types of admissions attributed to them in the parole agents' reports which are a part of the record in this case. Certainly, before a parolee should be held to have waived his right to a hearing on the basis of voluntary admission of a parole violation, it should be ascertained that the purported admission was voluntarily made and with the full knowledge of the consequences of said admission. In addition, Petitioners submit that in order to establish a waiver of a constitutional right to a hearing prior to revocation of parole, the admission of the alleged parole violations should be in writing and submitted to the board of parole, and the board, in determining that Petitioner has waived his right to a fact-finding hearing to establish parole violation, should do so only upon the written admission of the parolee.

Respectfully submitted.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MORRISSEY ET AL. v. BREWER, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-5103. Argued April 11, 1972—Decided June 29, 1972

Petitioners in these habeas corpus proceedings claimed that their paroles were revoked without a hearing and that they were thereby deprived of due process. The Court of Appeals, in affirming the District Court's denial of relief, reasoned that under controlling authorities parole is only "a correctional device authorizing service of sentence outside a penitentiary," and concluded that a parolee, who is still "in custody," is not entitled to a full adversary hearing such as would be mandated in a criminal proceeding. *Held:*

1. Though parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding, a parolee's liberty involves significant values within the protection of the Due Process Clause of the Fourteenth Amendment, and termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation. Pp. 9-11.

2. Due process requires a reasonably prompt informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation or arrest to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. The parolee should receive prior notice of the inquiry, its purpose, and the alleged violations. The parolee may present relevant information and (absent security considerations) question adverse informants. The hearing officer shall digest the evidence on probable cause and state the reasons for holding the parolee for the parole board's decision. Pp. 13-16.

3. At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and doc-

Syllabus

umentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. Pp. 16-19.

443 F. 2d 942, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the result, in which MARSHALL, J., joined. DOUGLAS, J., filed an opinion dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-5103

| | | |
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| John J. Morrissey and G. Donald Booher, Petitioners, v. Lou B. Brewer, Warden, et al. | } | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. |
|--|---|--|

[June 29, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole.

Petitioner Morrissey was convicted of false drawing or uttering of checks in 1967 pursuant to his guilty plea, and was sentenced to not more than seven years' confinement. He was paroled from the Iowa State Penitentiary in June 1968. Seven months later, at the direction of his parole officer, he was arrested in his home town as a parole violator and incarcerated in the county jail. One week later, after review of the parole officer's written report, the Iowa Board of Parole revoked Morrissey's parole and he was returned to the penitentiary located about 100 miles from his home. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report on which the Board of Parole acted shows that petitioner's parole was revoked on the basis of information that he had violated the conditions of parole by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insur-

ance company after a minor accident, and obtaining credit under an assumed name and failing to report his place of residence to his parole officer. The report states that the officer interviewed Morrissey, and that he could not explain why he did not contact his parole officer despite his effort to excuse this on the ground that he had been sick. Further, the report asserts that Morrissey admitted buying the car and obtaining credit under an assumed name and also admitted being involved in the accident. The parole officer recommended that his parole be revoked because of "his continual violating of his parole rules."

The situation as to petitioner Booher is much the same. Pursuant to his guilty plea, Booher was convicted of forgery in 1966 and sentenced to a maximum term of 10 years. He was paroled November 14, 1968. In August 1969, at his parole officer's direction, he was arrested in his home town for a violation of his parole and confined in the county jail several miles away. On September 13, 1969, on the basis of a written report by his parole officer, the Iowa Board of Parole revoked Booher's parole and Booher was recommitted to the state penitentiary, located about 250 miles from his home, to complete service of his sentence. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report with respect to Booher recommended that his parole be revoked because he had violated the territorial restrictions of his parole without consent, had obtained a driver's license under an assumed name and operated a motor vehicle without permission, and had violated the employment condition of his parole by failing to keep himself in gainful employment. The report stated that the officer had interviewed Booher and that he had acknowledged to the parole officer that he had left the specified territorial limits and had oper-

ated the car and had obtained a license under an assumed name "knowing that it was wrong." The report further noted that Booher had stated that he had not found employment because he could not find work that would pay him what he wanted—he stated he would not work for \$2.25 to \$2.75 per hour—and that he had left the area to get work in another city.

After exhausting state remedies, both petitioners filed habeas corpus petitions in the United States District Court for the Southern District of Iowa alleging that they had been denied due process because their paroles had been revoked without a hearing. The State responded by arguing that no hearing was required. The District Court held on the basis of controlling authority that the State's failure to accord a hearing prior to parole revocation did not violate due process. On appeal, the two cases were consolidated.

The Court of Appeals, dividing 4 to 3, held that due process does not require a hearing. The majority recognized that the traditional view of parole as a privilege rather than a vested right is no longer dispositive as to whether due process is applicable; however, on a balancing of the competing interests involved, it concluded that no hearing is required. The court reasoned that parole is only "a correctional device authorizing service of sentence outside the penitentiary"; the parolee is still "in custody." Accordingly, the Court of Appeals was of the view that prison officials must have large discretion in making revocation determinations, and that courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities. The majority expressed the view that "non-legal, non-adversary considerations" were often the determinative factors in making a parole revocation decision. It expressed concern that if adversary hearings were required for parole revocation, "with the full panoply of rights accorded in

criminal proceedings," the function of the parole board as "an administrative body acting in the role of *parens patriae* would be aborted" and the board would be more reluctant to grant parole in the first instance—an apprehension that would not be without some basis if the choice were between a full scale adversary proceeding or no hearing at all. Additionally, the majority reasoned that the parolee has no statutory right to remain on parole. Iowa law provides that a parolee may be returned to the institution at any time. Our holding in *Mempa v. Rhay*, 389 U.S. 128 (1967), was distinguished on the ground that it involved deferred sentencing upon probation revocation, and thus involved a stage of the criminal proceeding, whereas parole revocation was not a stage in the criminal proceedings. The Court of Appeals' decision was consistent with many other decisions on parole revocations.

In its brief in this Court, the State asserts for the first time that petitioners were in fact granted hearings after they were returned to the penitentiary. More generally, the State says that within two months after the Board revokes an individual's parole and orders him returned to the penitentiary, on the basis of the parole officer's written report, it grants the individual a hearing before the Board. At that time the Board goes over "each of the alleged parole violations with the returnee, and he is given an opportunity to orally present his side of the story to the Board." If the returnee denies the report, it is the practice of the Board to conduct a further investigation before making a final determination either affirming the initial revocation, modifying it, or reversing it.¹ The State asserts that Morrissey, whose parole

¹ The hearing required by due process, as defined herein, must be accorded *before* the effective decision. See *Armstrong v. Monza*, 380 U.S. 545 (1965). Petitioner asserts here that only one of the

was revoked on January 31, 1969, was granted a hearing before the Board on February 12, 1969. Booher's parole was revoked on September 13, 1969, and he was granted a hearing on October 14, 1969. At these hearings, the State tells us—in the briefs—both Morrissey and Booher admitted the violations alleged in the parole violation reports.

Nothing in the record supplied to this Court indicates that the State claimed, either in the District Court or the Court of Appeals, that petitioners had received hearings promptly after their paroles were revoked, or that in such hearing they admitted the violations; that information comes to us only in the State's brief here. Further, even the assertions that the State makes here are not based on any public record but on interviews with two of the members of the parole board. In the interview relied on to show that petitioners admitted their violations, the board member did not assert he could remember that both Morrissey and Booher admitted the parole violations with which they were charged. He stated only that, according to his memory, in the previous several years all but three returnees had admitted commission of the parole infractions alleged and that neither of the petitioners was among the three who denied them.

We must therefore treat this case in the posture and on the record the State elected to rely on in the District Court and the Court of Appeals. If the facts are otherwise, the State may make a showing in the District Court that petitioners in fact have admitted the violations charged before a neutral officer.

540 revocations ordered most recently by the Iowa Parole Board was reversed after hearing. Petitioner's Reply Brief, at 7, suggesting that the hearing may not objectively evaluate the revocation decision.

I

Before reaching the issue of whether due process applies to the parole system, it is important to recall the function of parole in the correctional process.

During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705 (1968). Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.² The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Under some systems parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society.

To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically parolees are forbidden to use liquor or

² See Warren, Probation in the Federal System of Criminal Justice, 19 Fed. Prob. 3 (Sept. 1955); Annual Report, Ohio Adult Parole Authority 1964/65, at 13-14. Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N. Y. U. L. Rev. 702, 705-707 (1963).

to have associations or correspondence with certain categories of undesirable persons. Typically also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. Arluke, *A Summary of Parole Rules*, 15 *Crime and Delinquency* 267, 272-273 (1969).

The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose: they prohibit, either absolutely or conditionally, behavior which is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.

The enforcement leverage which supports the parole conditions derives from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice not every violation of parole conditions automatically leads to revocation. Typically a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is

³ Note, *Observations on the Administration of Parole*, 79 *Yale L. J.* 698, 699-700 (1970).

not adjusting properly and cannot be counted on to avoid antisocial activity.⁴ The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid "undesirable" associations or correspondence. Cf. *Arciniega v. Freeman*, 404 U. S. 4 (1970). Yet revocation of parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35-45% of all parolees are subjected to revocation and return to prison.⁵ Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State.⁶

Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without commit-

⁴ *Ibid.*

⁵ President's Commission on Law Enforcement and Administration of Justice, Corrections 62. The substantial revocation rate indicates that parole administrators often deliberately err on the side of granting parole in borderline cases.

⁶ See *Morrissey v. Brewer*, 443 F. 2d 942, at 953-954, n. 5 (CA8 1971) (Lay, J., dissenting); *Rose v. Haskins*, 388 F. 2d 91, 104 (CA6 1968) (Celebrezze, J., dissenting).

ting antisocial acts. This part of the decision, too, depends on facts, and therefore, it is important for the Board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.

If a parolee is returned to prison, he often receives no credit for the time "served" on parole. Thus the returnee may face a potential of substantial imprisonment.

II

We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. *Mempa v. Rhay*, 389 U. S. 128 (1967). Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

We turn therefore to the question whether the requirements of due process in general apply to parole revocations. As MR. JUSTICE BLACKMUN has written recently, "This Court has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U. S. 365, 374. Whether any procedural protections are due depends on the extent to which

¹ Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime and Delinquency 267, 271 (1969); Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705, 733 (1968).

an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U. S. 154, 163 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin*, — U. S. — (decided June 12, 1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

We turn to an examination of the nature of the interest of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with

family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.⁸ He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation.⁹ The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases the parolee faces lengthy incarceration if his parole is revoked.

We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Turning to the question what process is due, we find that the State's interests are several. The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will

⁸ "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." *Bay v. Connecticut Bd. of Parole*, 443 F. 2d 1079, 1086 (CA2 1971).

⁹ See, e.g., *Murray v. Page*, 429 F. 2d 1359 (CA7 1970) (parole revoked after eight years; 15 years remaining on original term).

not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Yet the State has no interest in revoking parole without some informal procedural guarantees. Although the parolee is often formally described as being "in custody," the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody. Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole.¹⁰

This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See *People ex rel. Menechino v.*

¹⁰ Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. Crim. L. and P. S. 175, 194 (1964) (no decrease in Michigan, which grants extensive rights); *Rose v. Haskins*, 388 F. 2d 91, 102 n. 16 (CA6 1968) (Celebrezze, J., dissenting) (cost of imprisonment so much greater than parole system that procedural requirements will not change economic motivation).

Warden, 27 N. Y. 2d 376, 267 N. E. 2d 238, 239 and n. 2, 318 N. Y. S. 2d 449 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.¹¹

Given these factors, most States have recognized that there is no interest on the part of the State in revoking parole without any procedural guarantees at all.¹² What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.

III

We now turn to the nature of the process that is due, bearing in mind that the interest of both State and parolee will be furthered by an effective but informal hearing. In analyzing what is due, we see two important stages in the typical process of parole revocation.

(a) *Arrest of Parolee and Preliminary Hearing.* The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that

¹¹ See President's Comm'n on Law Enforcement and Administration of Justice, Corrections 83, 88 (1967).

¹² See n. 15, *infra*. As one state court has written, "Before such a determination or finding can be made it appears that the principles of fundamental justice and fairness would afford the parolee a reasonable opportunity to explain away the accusation of a parole violation. [The parolee] is entitled to a conditional liberty and possessed of a right which can be forfeited only by reason of a breach of the conditions of the grant." *Chase v. Page*, 456 P. 2d 590 (Okla. Crim. App. 1969).

the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. *Hyser v. Reed*, 318 F. 2d 225 (CA DC 1963). Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions. Cf. *Goldberg v. Kelly*, 397 U. S., at 267-271.

In our view due process requires that after the arrest, the determination that reasonable grounds exist for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee which destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer.¹³ However, we need make no assumptions one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have

¹³ Note, *Observations on the Admin. of Parole*, 79 Yale L. J. 698, 704-706 (1970) (parole officers in Connecticut adopt role model of social worker rather than an adjunct of police, and exhibit a lack of punitive orientation).

complete objectivity in evaluating them.¹⁴ *Goldberg v. Kelly* found it unnecessary to impugn the motives of the caseworker to find a need for an independent decisionmaker to examine the initial decision.

This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In *Goldberg*, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional "neutral and detached" officer; it required only that the hearing be conducted by some person *other than* one initially dealing with the case. It will be sufficient, therefore, in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation. A State could certainly choose some other independent decisionmaker to perform this preliminary function.

With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, persons who have given adverse information on which parole revocation is to be based

¹⁴ This is not an issue limited to bad motivation. "Parole agents are human, and it is possible that friction between the agent and parolee may have influenced the agent's judgment." 4 Attorney General's Survey on Release Procedures 246 (1939).

are to be made available for questioning in his presence. However, if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

The hearing officer shall have the duty of making a summary or digest, of what transpires at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. As in *Goldberg*, the decision-maker should state the reasons for his determination and indicate the evidence he relied on . . . but it should be remembered that this is not a final determination calling for "formal findings of fact or conclusions of law." 397 U. S. at 271. No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error.

(b) *The Revocation Hearing.* There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard, and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest the violation does not warrant revocation.

The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as the State suggests occurs in some cases, would not appear to be unreasonable.

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds.¹⁵ Our task is limited to deciding the

¹⁵ Very few States provide no hearing at all in parole revocations. Thirty States provide in their statutes that a parolee shall receive some type of hearing. See Ala. Code Tit. 42, § 12 (1959); Alaska Stats. § 33.15.220 (1962); Ariz. Rev. Stats. Ann. § 31-417 (1956); Ark. Stats. Ann. § 43-2810 (1971 Supp.); Del. Code Ann. Tit. 11, § 4352 (1970 Supp.); Fla. Stats. Ann. § 947.23 (1) (1972 Supp.); Ga. Code Ann. § 77-519 (1971 Supp.); Hawaii Rev. Stats. § 353-66 (1968); Idaho Code §§ 20-229, 20-229A (1971 Supp.); Ill. Ann. Stats. c. 108, § 207 (1972 Supp.); Ind. Stats. Ann. § 13-1611 (1970 Supp.); Kan. Stat. Ann. § 22-3721 (1971); Ky. Rev. Stats. Ann. § 439.330 (1)(e) (1962); La. Rev. Stats. § 15:574.9 (1972 Supp.); Me. Rev. Stats. Ann. c. 34, § 1675 (1970 Supp.); Md. Ann. Code, Art. 41, § 117 (1971); Mich. Stats. Ann. § 28.2310 (1) (1972 Supp.); Miss. Code Ann. § 4004-13 (1956); Mo. Ann. Stats. § 549.265 (1971 Supp.); Mont. Rev. Code §§ 94-9838, 94-9835 (1969); N. H. Rev. Stats. Ann. § 607:46 (1955); N. M. Stats. Ann. § 41-17-28 (1964); Conf. Laws of N. Y. Correction Law § 212(7) (1971 Supp.); N. D. Cent. Code 12-59-15 (1971 Supp.); Pa. Stats. Ann. Tit. 61, § 221.21a (b) (1964); Tenn. Code § 40-3619 (1955); Texas Code of Crim. Proc., Art. 42.12, § 22 (1966); Vermont Stats. Ann. Tit. 28, § 1081 (1970); Wash. Rev. Code §§ 9.95.120 through 9.95.126 (1971 Supp.); W. Va. Code § 62-12-19 (1966). Decisions of state and federal courts have required a number of other States to provide hearings. See *Hutchinson v. Patterson*, 267 F. Supp. 433 (Colo. 1967) (approving parole board regulations); *United States ex rel. Bey v. Conn. Bd. Parole*, 443 F. 2d 1079 (CA2 1971) (requiring counsel to be appointed for revocation hearings); *State v. Holmes*, 109 N. J. Super. 180, 262 A. 2d 725 (1970); *Chase v. Page*, 456 P. 2d 590 (Okla. Crim. App. 1969); *Bearden v. South Carolina*, 40 F. 2d 1090 (CA4 1971) (North Carolina and Virginia also subject to

minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense; it is a narrow inquiry; the process should be flexible enough to consider evidence, including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

We do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent.

We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. Control over the required proceedings by the hearing officers can assure that delaying tactics and other abuses sometimes pre-

Fourth Circuit rule); *Baine v. Beckstead*, 10 Utah 2d 4, 347 P. 2d 554 (1959); *Goolsby v. Gagnon*, 322 F. Supp. 460 (E.D. Wis. 1971). A number of States are affected by no legal requirement to grant any kind of hearing.

¹⁶ The Model Penal Code § 305.16 (Proposed Official Draft 1962) provides that "The institutional parole staff shall render reasonable aid to the parolee in preparation for the hearing and he shall be permitted to advise with his own legal counsel."

sent in the traditional adversary trial situation do not occur. Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.

In the peculiar posture of this case, given the absence of an adequate record, we conclude the ends of justice will be best served by remanding the case to the Court of Appeals for its return of the two consolidated cases to the District Court with directions to make findings on the procedures actually followed by the Parole Board in these two revocations. If it is determined that petitioners admitted parole violations to the Parole Board, as Iowa contends, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter. If the procedures followed by the Parole Board are found to meet the standards laid down in this opinion that, too, would dispose of the due process claims for these cases.

We reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and Remanded.

SUPREME COURT OF THE UNITED STATES

No. 71-5103

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| John J. Morrissey and G. Donald Booher, Petitioners. v. Lou B. Brewer, Warden, et al. | } On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. |
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[June 29, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the result.

I agree that a parole may not be revoked consistently with the Due Process Clause unless the parolee is afforded, first, a preliminary hearing at the time of arrest to determine whether there is probable cause to believe that he has violated his parole conditions and, second, a final hearing within a reasonable time to determine whether he has, in fact, violated these conditions and whether his parole should be revoked. For each hearing the parolee is entitled to notice of the violations alleged and the evidence against him, opportunity to be heard in person and to present witnesses and documentary evidence, and the right to confront and cross-examine adverse witnesses, unless it is specifically found that the witness would thereby be exposed to a significant risk of harm. Moreover, in each case the decisionmaker must be impartial, there must be some record of the proceedings, and the decisionmaker's conclusions must be set forth in written form indicating both the evidence and the reasons relied upon. Because the Due Process Clause requires these procedures, I agree that the case must be remanded as the Court orders.

The Court, however, states that it does not now decide whether the parolee is also entitled at each hearing to the assistance of retained counsel or of appointed counsel if he is indigent. *Goldberg v. Kelly*, 397 U. S. 254 (1970),

nonetheless plainly dictates that he at least "must be allowed to retain an attorney if he so desires." *Id.*, at 270. As the Court said there, "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of" his client. *Id.*, at 270-271. The only question open under our precedents is whether counsel must be furnished the parolee if he is indigent.

SUPREME COURT OF THE UNITED STATES

No. 71-5103

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[June 29, 1972]

MR. JUSTICE DOUGLAS, dissenting in part.

Each petitioner was sentenced for a term in an Iowa penitentiary for forgery. Somewhat over a year later each was released on parole. About six months later each was arrested for a parole violation and confined in a local jail. In about a week the Iowa Board of Parole revoked their paroles and each was returned to the penitentiary. At no time during any of the proceedings which led to the parole revocations were they granted a hearing or the opportunity to know, question, or challenge any of the facts which formed the basis of their alleged parole violations. Nor were they given an opportunity to present evidence on their own behalf nor to confront and cross-examine those on whose testimony their paroles were revoked.

Each challenged the revocation in the state courts and, obtaining no relief, filed the present petitions in the Federal District Court which denied relief. Their appeals were consolidated in the Court of Appeals which, sitting *en banc*, in each case affirmed the District Court by a four-to-three vote, 443 F. 2d 942. The cases are here on a petition for a writ of certiorari, 404 U. S. 999, which we granted because there is a conflict between the decision below and *Hahn v. Burke*, 430 F. 2d 100, decided by the Court of Appeals for the Seventh Circuit.

Iowa has a board of parole¹ which determines who shall be paroled. Once paroled a person is under the supervision of the director of the division of corrections of the Department of Social Services who in turn supervises parole agents. Parole agents do not revoke the parole of any person but only recommend that the board of parole revoke it. The Iowa Act provides that each parolee "shall be subject, at any time, to be taken into custody and returned to the institution" from which he was paroled.² Thus Iowa requires no notice or hearing to put a parolee back in prison, *Curtis v. Bennett*, 256 Iowa 1164, 431 N. W. 2d 1; and it is urged that since parole, like probation, is only a privilege it may be summarily revoked. See *Escob v. Zerbst*, 295 U. S. 490, 492-

¹Code of Iowa § 247.5 (1971) provides in part:

"The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be a sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole."

²*Id.* § 247.9 provides in part:

"All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled."

³"A fundamental problem with [the right-privilege] theory is that probation is now the most frequent penal disposition just as release on parole is the most frequent form of release from an institution. They bear little resemblance to episodic acts of mercy by a forgiving sovereign. A more accurate view of supervised release is that it is now an integral part of the criminal justice process and shows every sign of increasing popularity. Seen in this light the question becomes whether legal safeguards should be provided for hundreds of thousands of individuals who daily are processed and regulated by Governmental agencies. The system has come to de-

493; *Ughbanks v. Armstrong*, 208 U. S. 481. But we have long discarded the right-privilege distinction. See, e. g., *Graham v. Richardson*, 403 U. S. 365, 374; *Bell v. Burson*, 402 U. S. 535, 539; *Pickering v. Board of Education*, 391 U. S. 563, 568; cf. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

The Court said in *United States v. Wilson*, 7 Pet. 150, 161, that a "pardon is a deed." The same can be said of a parole, which when conferred gives the parolee a degree of liberty which is often associated with property interests.

We held in *Goldberg v. Kelly*, 397 U. S. 254, that the termination by a State of public assistance payments to a recipient without a prior evidentiary hearing denies him procedural due process in violation of the Fourteenth Amendment. Speaking of the termination of welfare benefits we said:

"Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a "privilege" and not a "right." *Shapiro v. Thompson*, 394 U. S. 618, 627 n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U. S. 398 (1963); or to denial of a tax exemption, *Speiser v. Randall*, 357 U. S. 513 (1958); or to discharge from public employment, *Slochower v. Board of Higher*

pend on probation and parole as much as do those who are enmeshed in the system. Thus, in dealing with claims raised by offenders, we should make decisions based not on an outworn cliché, but on the basis of present-day realities." F. Cohen, *A Legal Challenge to Corrections: Implications for Manpower and Training* 32 (1969).

Education, 350 U. S. 551 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah v. Larche*, 363 U. S. 420, 440, 442 (1960). 397 U. S. at 262-263.

Under modern concepts of penology, paroling prisoners is part of the rehabilitative aim of the correctional philosophy. The objective is to return a prisoner to a full family and community life. See generally Note, 56 Geo. L. J. 705 (1968); Note, 38 N. Y. U. L. Rev. 702 (1963); Comment, 72 Yale L. J. 368 (1962); and see *Baine v. Beckstead*, 10 Utah 2d 4, 347 P. 2d 554 (1959). The status he enjoys as a parolee is as important a right as those we reviewed in *Goldberg v. Kelly*. That status is conditioned upon not engaging in certain activities and perhaps in not leaving a certain area or locality. Violations of conditions of parole may be technical, they may be done unknowingly, they may be fleeting and of no consequence.⁴ See, e. g., *Arciniega v. Freeman*, 404

⁴ The violations alleged in these cases on which revocation was based are listed by the Court of Appeals, 443 F. 2d 942, nn. 1 and 2.

For a discussion of the British system that dispenses with precise conditions usually employed here see 120 U. Pa. L. Rev. 282, 311-

U. S. 4; Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. Colo. L. Rev. 197, 229 (1970). The parolee should in the concept of fairness implicit in due process have a chance to explain. Rather, under Iowa's rule revocation proceeds on the *ipse dixit* of the parole agent; and on his word alone each of these petitioners has already served three additional years in prison.⁵ The charges may or may not be true. Words of explanation may be adequate to transform into trivia what looms large in the mind of the parole officer.

"[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent v. United States*, 383 U. S. 541, 554 (1966).

Parole,⁶ while originally conceived as a judicial function, has become largely an administrative matter. The parole boards have broad discretion in formulating and imposing parole conditions. "Often vague and moralistic parole conditions may seem oppressive and unfair to the parolee." Dawson, *Sentencing* 306 (1969). They are drawn "to cover any contingency that might occur," *id.*, at 307, and are designed to maximize "control over the parolee by his parole officer." *Ibid.*

312 (1971). As to conditions limiting constitutional rights see *id.*, at 313-324, 326-339.

⁵ As to summary deprivations of individual liberty in Communist nations, see, e. g., Shao-chuan Léng, *Justice In Communist China* 34 (1967); 1 P. Tang, *Communist China Today* 271 (2d ed. 1961); J. Hazard, *Communists and Their Law* 121-126 (1969).

⁶ "Parole is used after a sentence has been imposed while probation is usually granted in lieu of a prison term." Clegg, *Probation and Parole* 22 (1964). See *Bainé v. Beckstead*, 10 Utah 2d 4, 9, 347 P. 2d 554, —; *People ex rel. Combs v. LaVallee*, 29 App. Div. 2d 128, 131, 286 N. Y. S. 2d 600, 603.

Parole is commonly revoked on mere suspicion that the parolee may have committed a crime. *Id.*, at 366-367. Such great control over the parolee vests in a parole officer a broad discretion in revoking parole and also in counseling the parolee—referring him for psychiatric treatment or obtaining the use of specialized therapy for narcotic addicts or alcoholics. *Id.*, at 321. Treatment of the parolee, rather than revocation of his parole, is a common course. *Id.*, at 322-323. Counseling may include extending help to a parolee in finding a job. *Id.*, at 324 *et seq.*

A parolee, like a prisoner, is a person entitled to constitutional protection, including procedural due process. At the federal level the construction of Regulations of the Federal Parole Board presents federal questions of which we have taken cognizance. See *Arciniega v. Freeman*, 404 U. S. 4. At the state level, the construction of parole statutes and regulations is for the States alone, save as they implicate the Federal Constitution in which event the Supremacy Clause controls.

It is only procedural due process, required by the Fourteenth Amendment, that concerns us in the present cases. Procedural due process requires the following.

If a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or to a local jail. Rather, notice of the alleged violation should

See President's Commission on Law Enforcement and Administration of Justice, Corrections, 83, 84 (1967); 120 U. Pa. L. Rev. 282, 348-358 (1971).

As Judge Skelly Wright said in *Huser v. Reed*, 318 F. 2d 225, 262 (CA DC 1963):

"Where serious violations of parole have been committed the parolee will have been arrested by local or federal authorities on charges stemming from those violations. Where the violation of parole is not serious, no reason appears why he should be incarcerated

be given to the parolee and a time set for a hearing.⁹ The hearing should not be before the parole officer, as he is the one who is making the charge and "there is inherent danger in combining the functions of judge and advocate." *Jones v. Rivers*, 338 F.2d 862, 877 (CA4 1964) (Sobeloff, J., concurring). Moreover, the parolee should be entitled to counsel.¹⁰ See *Hewett v. North Carolina*,

before hearing. If, of course, the parolee willfully fails to appear for his hearing, this in itself would justify issuance of the warrant." Accord, *In re Tucker*, 5 Cal. 3d 171, 199, 486 P. 2d 657, 876, 95 Cal. Rptr. 761, 780 (1971) (Tobriner, J.).

⁹As we said in another connection in *Greene v. McElroy*, 360 U.S. 474, 496-497:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny." (Citations omitted.)

¹⁰American Bar Assn. Project on Minimum Standards of Criminal Justice, Standards Relating to Providing Defense Services (1968); Amer. L. Inst., Model Penal Code, §301.4, §305.15 (1); Dawson, Sentencing, The Decision as to Type, Length, and Conditions of Sentence, Report Amer. Bar Foundation's Survey of the Administration of Criminal Justice in the U. S. (1969). For the experience of Michigan in giving hearings to parolees see *id.*, at 355. In Michigan it is reported that only one out of six parole violators retains counsel. One who cannot afford counsel is said to be pro-

415 F. 2d 1316, 1322-1325 (CA4 1969); *People ex rel. Combs v. LaVallee*, 29 App. Div. 2d 128, 286 N. Y. S. 2d 600 (1968); *Perry v. Willard*, 247 Ore. 145, 427 P. 2d 1020 (1967). As the Supreme Court of Oregon said in *Perry v. Willard*, "A hearing in which counsel is absent or is present on behalf of one side is inherently unsatisfactory if not unfair. Counsel can see that the relevant facts are brought out, vague and insubstantial allegations discounted, and irrelevancies eliminated." *Id.*, at 148, 427 P. 2d, at 1022. Cf. *Mempa v. Rhay*, 389 U. S. 128, 135.

The hearing required is not a grant of the full panoply of rights applicable to a criminal trial. But confrontation with the informer may, as *Roiviano v. United States*, 353 U. S. 53, illustrates, be necessary for a fair hearing and the ascertainment of the truth. The hearing is to determine the fact of parole violation. The results of the hearing would go to the parole board or other authorized state agency—for final action, as would cases which involved voluntary admission of violations.

The rule of law is important in the stability of society. Arbitrary actions in the revocation of paroles can only impede and impair the rehabilitary aspects of modern penology. "Notice and opportunity for hearing appropriate

to be given by the hearing members of the board. *Id.*, at 34. The number who ask for public hearings are typically five or six a year, the largest in a single year being 10. Michigan has had this law since 1937. *Ibid.* But the Michigan experience may not be typical, for a parole violator is picked up and returned at once to the institution from which he was paroled. *Id.*, at 352-353.

By way of contrast, parole revocation hearings in California are secretive affairs conducted behind closed doors and with no written record of the proceedings and in which the parolee is denied the assistance of counsel and the opportunity to present witnesses on his behalf. Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 Calif. L. Rev. 1215 (1971). See also Note, 56 Geo. L. J. 704 (1968) (federal parole revocation procedures).

to the case.¹⁰ *Boddie v. Connecticut*, 401 U. S. 371, 378, are the rudiments of due process which restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men.¹¹

We do not prescribe the precise formula for the management of the parole problems. We do not sit as an ombudsman, telling the States the precise procedures they must follow. We do say that so far as the due process requirements of parole revocation are concerned:¹²

(1) the parole officer—whatever may be his duties under various state statutes—in Iowa appears to be an agent having some of the functions of a prosecutor and of the police

(2) the parole officer is therefore not qualified as a hearing officer

(3) the parolee is entitled to a due process notice and a due process hearing of the alleged parole violations including, for example, the opportunity to be confronted by his accusers and to present evidence and argument on his own behalf

(4) the parolee is entitled to the freedom granted a parolee until the results of the hearing are known and the parole board—or other authorized state agency—acts.¹³

¹⁰ The Brief of the American Civil Liberties Union, *amicus curiae*, contains in Appendix A the States that by statute or decision require some form of hearing before parole is revoked and those that do not. All but eight States now hold hearings on revocation of probation and parole, some with trial-type rights including representation by counsel.

¹² We except of course the commission of another offense which from the initial step to the end is governed by the normal rules of criminal procedure.

¹³ The American Correctional Association states in its Manual of Correctional Standards, p. 279 (3d ed. 1966) that:

"To an even greater extent than in the case of imprisonment, probation and parole practice is determined by an administrative

The judgments are reversed and the cases are remanded to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.

discretion that is largely uncontrolled by legal standards, protections or remedies. Until statutory and case law are more fully developed, it is vitally important within all of the correctional fields that there should be established and maintained reasonable norms and remedies against the sorts of abuses that are likely to develop where men have great power over their fellows and where relationships may become both mechanical and arbitrary."

And it provides for parole revocation rehearings:

"As soon as practicable after causing an alleged violator taken into custody on the basis of a parole board warrant, the prisoner should be given an opportunity to appear before the board or its representative. The prisoner should be made fully aware of the reasons for the warrant and given ample opportunity to refute the charges placed against him or to comment as to extenuating circumstances. The hearing should be the basis for consideration of possible reinstatement to parole supervision on the basis of the findings of fact or of reparole where it appears that further incarceration would serve no useful purpose." *Id.* at 130.

The American Bar Association states in its brief *amicus* in the present cases that it is "in full agreement with the American Correctional Association in this instance. The position that a hearing is to be afforded on parole revocation is consistent with several sets of criminal justice standards formally approved by the Association through its House of Delegates."